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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NEHMIAS MUNOZ,

4 Plaintiff,

5 v.

14 Cv. 6628 (DLC)

6 POLICE OFFICER ROBERT REID,
7 POLICE OFFICER STEPHEN JONES,
8 SERGEANT BRIAN FLYNN, and
9 SERGEANT JAMES KELLY,

Defendants.

-----x

10
11 March 21, 2017
9:13 a.m.

12 Before:

13 HON. DENISE COTE

14 District Judge

15 APPEARANCES

16 NEHMIAS MUNOZ
17 Pro Se Plaintiff

18 ZACHARY CARTER
19 Corporation Counsel of the City of New York
20 ARIEL LICHTERMAN
21 CAROLYN K. DEPOIAN
22 Assistant Corporation Counsel
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24
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(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, everyone.

ALL PRESENT: Good morning.

THE COURT: And Mr. Munoz, I believe we have returned those materials that you asked us to keep for you overnight, so I think you have your complete collection again, am I right?

MR. MUNOZ: Yeah. I kind of saw my papers on the counter, but yeah. Thank you, ma'am.

THE COURT: Yes. You're welcome. You're welcome. And this is our chance to review the jury charge and deal with any other issues.

Let me ask the defendants, do you have any requests or objections to the jury charge that was marked yesterday as a court exhibit?

MS. DEPOIAN: No, your Honor, we don't.

THE COURT: Thank you.

And Mr. Munoz, I don't know that you needed to read this with care. I assure you that I tried to write this in light of the prevailing law in the circuit in which I sit, in which this Court sits, but did you have any requests or comments that you'd like to make?

MR. MUNOZ: Actually, you kind of rested yesterday, so I read it also, you know. I feel correct. I have no problem with it.

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1 THE COURT: Thank you very much. Yes, you're right.
2 A lot of the fundamental principles I discussed several times
3 in preparation for this trial and during the trial, so you're
4 right, Mr. Munoz. We've tried to stay within the boundaries of
5 the law respecting your rights and the defendants' rights.

6 So let's just discuss then what's going to happen this
7 morning. At 9:30 we expect to have a jury. We have a witness
8 on the stand, and when the testimony of that witness is
9 finished, as I understand it, we have one more witness to
10 testify. And Mr. Munoz, it's my understanding you're going to
11 call the last defendant as your last witness, is that right?

12 MR. MUNOZ: Yes, ma'am.

13 THE COURT: Great. And then, based on our
14 conversation yesterday, I understand the plaintiff will rest
15 except potentially for a photograph or two.

16 I think first thing this morning, if I remember
17 correctly, we needed to get the photograph of the gun admitted
18 into evidence. Am I remembering that correctly, counsel?

19 MS. DEPOIAN: Yes, your Honor. That's our memory as
20 well. And we'll just state for the record, I believe there's
21 only one copy in the courtroom of that in plaintiff's
22 possession, but we have no objection.

23 THE COURT: Great. Thank you so much. So maybe we'll
24 do that first thing.

25 Mr. Munoz, can you give my deputy a copy of that

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1 photograph. Oh, we have it. We have it.

2 THE LAW CLERK: And I've made copies.

3 THE COURT: Good.

4 So we have copies made for everyone. We'll return the
5 original to the plaintiff and my staff will hand out copies to
6 defense counsel. I have retained a copy for myself. So we'll
7 just do that first thing before we complete Sergeant Flynn's
8 testimony. And I think --

9 MR. MUNOZ: Your Honor --

10 THE COURT: And I think, Mr. Munoz, that's the only
11 additional piece of evidence you wanted to offer at this trial.
12 Am I right, Mr. Munoz?

13 MR. MUNOZ: I have two more I told you I was going to
14 bring today. I have them right here.

15 THE COURT: Okay. My staff will pick those up, show
16 them to defense counsel, see if there's an objection.

17 MR. MUNOZ: I mentioned it yesterday.

18 THE COURT: Thank you.

19 MR. MUNOZ: The one about the firearm, and this is
20 Flynn's -- I mean Jones' hand. Not even a good copy at all.

21 MS. DEPOIAN: Your Honor, would you like to hear our
22 objections now or --

23 THE COURT: Do you have objections?

24 MS. DEPOIAN: Yes, your Honor, just to the one
25 photograph.

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1 THE COURT: Which one do you not object to?

2 MS. DEPOIAN: The gun. We do not object to the gun.

3 THE COURT: Thank you. That will be marked as a
4 plaintiff's exhibit.

5 MR. MUNOZ: Your Honor?

6 THE COURT: Excuse me one second.

7 We're up to 3. So the second picture of the gun will
8 be marked as Plaintiff's Exhibit 3. There's no objection, so
9 at the beginning of testimony today, you will offer and we will
10 receive the two pictures of the gun, which are Plaintiff's
11 Exhibits 2 and 3.

12 So let me understand what the defendant's objection is
13 to what we're going to mark as Plaintiff's Exhibit 4. And I
14 understand this to be a picture of defendant Jones' arm. So
15 I'll hear the defendants for their objection and then I'll hear
16 you, Mr. Munoz.

17 MS. DEPOIAN: Your Honor, we just object to the
18 exhibit since the photograph is very blurry and for that reason
19 it's very confusing to the jury. You can't really even see
20 that it's an arm. That's the basis of our objection.

21 THE COURT: Give me just one second here.

22 So defendant Jones will be your last witness. Am I
23 right, Mr. Munoz?

24 MR. MUNOZ: Yes, ma'am.

25 THE COURT: So you can use your picture, which has

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1 been marked as Plaintiff's Exhibit 4, with him. He will either
2 recognize it or not, and you can ask questions about it, and
3 depending on how the testimony goes, if you choose to continue
4 to want to offer that exhibit, which you may use during your
5 examination of him, I will rule based on the testimony that's
6 come in as of that time. Okay?

7 MR. MUNOZ: Thank you, ma'am.

8 THE COURT: Thank you. So I'm returning Plaintiff's
9 Exhibit 4 to Mr. Munoz.

10 Now we have copies as well of the special verdict
11 form. We're going to mark that as a court exhibit and hand it
12 out to everyone. No need to spend a lot of time with it now,
13 but I wanted you to have copies. That's going to be Court
14 Exhibit?

15 THE DEPUTY CLERK: 3.

16 MR. MUNOZ: Excuse me, your Honor.

17 THE COURT: Hold on one second here, Mr. Munoz. I
18 want to describe what's going to happen this morning.

19 So we're going to finish the testimony, the plaintiff
20 will complete his case, the defendants will rest. We've had
21 the charging conference. So the next thing that will happen
22 will be summations. We'll start with a summation from the
23 plaintiff, and again, Mr. Munoz, it's that chance for you to
24 not testify -- you already did that under oath on the witness
25 stand -- but instead, standing behind that podium, to directly

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1 address the jury and tell them what you think the evidence in
2 this trial has shown and why they should render a verdict in
3 your favor. You can't ask for specific amounts of money, you
4 can't name a dollar figure, but you can ask for a verdict in
5 your favor and an award of damages in your favor. Then the
6 defendants will have a chance to give their summation. And I
7 will give you, Mr. Munoz, a brief opportunity to have the last
8 word to the jury, just to make sure that there's nothing left
9 that would be appropriate for you to say about the evidence
10 that came in during this trial. And then I will give the jury
11 the charge and they will retire to deliberate on this case.

12 Let me ask defense counsel, any questions or other
13 issues to raise this morning?

14 MS. DEPOIAN: Nothing, your Honor.

15 THE COURT: Mr. Munoz, any questions or other issues
16 to raise this morning?

17 MR. MUNOZ: Not really. Just that I'm --

18 THE DEPUTY CLERK: Please stand.

19 MR. MUNOZ: I'm sorry. Not really. It's just -- is
20 it all right if I could get like a minute or two so I could do
21 my summation? I didn't get a chance to do it. I was just
22 capable of reading the --

23 THE COURT: The charge?

24 MR. MUNOZ: Yeah, jury charge.

25 THE COURT: That's just fine. We're going to take a

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1 five-minute recess now. And indeed, we won't resume until we
2 have all eight jurors. So we have at least five minutes.
3 Ms. Rojas will let us know when all eight jurors have arrived.
4 Thank you so much.

5 MR. MUNOZ: Thank you, ma'am.

6 THE DEPUTY CLERK: All rise.

7 (Recess)

8 (In open court; jury not present)

9 THE COURT: Bring in the jury.

10 (Jury present)

11 THE COURT: Please be seated.

12 Good morning, ladies and gentlemen.

13 THE JURORS: Good morning.

14 THE COURT: We have just one housekeeping issue to
15 raise with you. Plaintiff's Exhibit 1, which you may remember,
16 was a set of three photographs, and I need to formally receive
17 those on the record. And I believe the plaintiff wishes to
18 offer two more photographs of a weapon, and they've been marked
19 as Plaintiff's Exhibits 2 and 3, and I'm going to receive those
20 as well now.

21 (Plaintiff's Exhibits 1, 2, and 3 received in
22 evidence)

23 THE COURT: And at this point, Sergeant Flynn, if you
24 could retake the witness stand.

25 You may be seated. I remind you you're still under

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Flynn - Direct

1 oath.

2 THE WITNESS: Good morning.

3 THE COURT: So Mr. Munoz, you may continue your
4 examination of Sergeant Flynn.

5 MR. MUNOZ: Good morning, your Honor. Good morning,
6 jury.

7 THE JURORS: Good morning.

8 BRIAN FLYNN, resumed.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. MUNOZ:

11 Q. Sergeant Flynn, good morning.

12 A. Good morning, Mr. Munoz.

13 Q. So you said yesterday, as -- you saw me pull the firearm
14 with my right hand out of my waist, you said, or out of my
15 pocket?

16 A. I don't know if it was your waist or your pocket, but down
17 by your waist area.

18 Q. Okay. Was you by yourself or Sergeant Kelly next to you?

19 A. Sergeant Kelly and Officer Reid were already about to
20 engage you.

21 Q. So all three of y'all was there then.

22 A. Correct.

23 Q. It wasn't you by yourself?

24 A. No, not me by myself, no.

25 Q. So you have -- you have -- at the time you were with the

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Flynn - Direct

1 officers, you have a sergeant and a fellow officer and you, and
2 if you telling me that I'm pulling the gun out and you couldn't
3 see or all three of y'all couldn't grab me and prevent the
4 tussle with the firearm, if there's three and there's only me,
5 when I'm actually pulling the gun out?

6 MR. LICHTERMAN: Objection, your Honor.

7 THE COURT: Sustained. So again, Mr. Munoz, this
8 isn't an opportunity to --

9 MR. MUNOZ: I'm trying to make it a question.

10 THE COURT: Yes. Just make it a question of fact.

11 BY MR. MUNOZ:

12 Q. So you got two officers and a sergeant, and you see me
13 withdraw a gun. You couldn't, all three of y'all, grab me to
14 prevent the struggle and the firearm falling on the floor and
15 all that?

16 THE COURT: So Mr. Munoz, I think I understand what
17 you're trying to get at, but I'm just going to suggest a
18 question to you that may capture what you're trying to ask and
19 not be as much an argument as the question of fact, okay?

20 MR. MUNOZ: Okay.

21 THE COURT: Okay.

22 BY MR. MUNOZ:

23 Q. Okay. So all three of y'all couldn't grab me at that
24 moment when you see me withdrawing the gun? That's a question.

25 A. Within seconds, within split seconds, Officer Kelly and --

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Flynn - Direct

1 I mean, Sergeant Kelly and Officer Reid did grab you, grabbed
2 your arm to control your gun, and at this point I was able to
3 grab your upper torso from like the rear side, so we did try to
4 grab you, when you had the gun.

5 Q. And then what happened?

6 A. A little tussle kind of took place, and we all fell to the
7 ground at that point.

8 Q. And I still had the gun on which hand?

9 A. To my knowledge, you fell on the gun in your -- underneath
10 your chest on your right hand.

11 Q. So the gun wasn't on my left hand, over my left rib.

12 A. No. It was in your right hand when you fell underneath
13 your body.

14 Q. Okay. So did you know who cuffed me?

15 A. I was able to cuff your left hand at one point during the
16 struggle.

17 Q. But you don't remember who actually cuffed me.

18 A. I just said I cuffed your left hand during the struggle.

19 Q. Both hands.

20 A. I'm not sure. I was able to secure your left hand during
21 the struggle and cuff that hand during the struggle and we were
22 able to eventually get another set of cuffs out and get it on
23 your right hand, and we put the two cuffs together to cuff you
24 easier.

25 Q. But you're saying "we," but you don't know who.

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Flynn - Direct

1 A. It was either one of the three other officers that were
2 here.

3 Q. So you have no knowledge who was it then.

4 A. I don't remember exactly who was the other officer who put
5 the cuff on your right hand, sir.

6 Q. And what happened when we all fell down?

7 A. Sergeant Kelly, I believe, landed right on top of you, I
8 was to your left, and Sergeant -- I mean Officer Reid was to
9 your right. Against your body.

10 Q. And as what I believe Sergeant Kelly had both knees on me,
11 both of you? Was he also leaning on me with both knees?

12 A. No. It was on the left --

13 THE COURT: I'm sorry. One question at a time. Which
14 question would you like the officer to answer?

15 Q. So Sergeant Kelly had both knees on me. Did you know who
16 was the other officer with both knees?

17 THE COURT: Is that the question you want to ask,
18 Mr. Munoz? Did Sergeant Kelly have knees on you?

19 MR. MUNOZ: I take that back, your Honor.

20 Q. Who was the other officer kneeling me also with the weight
21 on my back?

22 A. From what I remember, Sergeant Kelly was on top of you, I
23 was to your left, and Officer Reid was to your right.

24 Q. So when you was on top of me, what was you doing?

25 A. I wasn't on top of you. I was to your -- I was on the side

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Flynn - Direct

1 of you by your upper torso, your left torso, sir.

2 Q. And what was you doing?

3 A. I was striking and punching your left shoulder and your
4 left tricep or the back of your arm.

5 Q. You wasn't striking me on my left rib?

6 A. To my knowledge, I don't remember striking your left rib.

7 Q. And you don't remember who punched me in my left eye.

8 A. No, I do not, sir.

9 Q. Did you acknowledge -- did you acknowledge the left eye
10 was -- had a -- had a cut?

11 A. Yes. You received a small laceration over your left eye
12 during the struggle.

13 Q. So you don't remember who -- who caused that laceration on
14 my left eye.

15 A. I don't know if it was from you falling on the ground, you
16 hit your head, or you were struck in the face. I'm not sure.
17 I didn't really see somebody hit you in the face.

18 Q. But I just told you standing up, so how can you say falling
19 down?

20 THE COURT: Excuse me. This isn't your chance to
21 testify. It's just to ask a question, Mr. Munoz.

22 Q. So who eventually fell on the ground? Didn't the firearm
23 eventually fell out of my hand or was it Sergeant Reid the one
24 who recovered it?

25 A. Sergeant Reid recovered it from your hand.

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Flynn - Direct

1 Q. Can you explain to the jurors and me how he recovered it.

2 A. I didn't actually see him recover it. I just remember
3 hearing him say, "I have the gun."

4 Q. So you was the one who -- who cuffed me.

5 A. I cuffed your left hand, sir.

6 Q. Okay. And once again, you didn't see -- you didn't know
7 what other officer cuffed my right hand, both hands.

8 A. At that point I was more concerned about keeping your left
9 hand cuffed and isolated from the rest of your body so you
10 wouldn't be able to pull it back in and possibly grab the gun
11 at that point. I was more concerned about, you know, having
12 your left hand cuffed and me pretty much pinning it to the
13 ground so you couldn't move.

14 Q. So you had the other cuff on the other hand; that's what
15 you're trying to tell me? You cuffed me through my right or
16 left hand, or was it you cuffed me to the right hand?

17 A. I cuffed your left hand, sir.

18 Q. So you holding the other side of the cuff, so there's two
19 cuffs per hand. You're holding the other side of the cuff.

20 A. I stated that I cuffed your left side, your hand, and I'm
21 not sure who was able to put the other cuff on your right hand,
22 and then we brought the two cuffs together to completely cuff
23 you.

24 Q. That's not the question. The question is: Was you holding
25 the other side of the handcuff? There's two, two cuffs for

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Flynn - Direct

1 each hand, for one of each hand. Was you holding the other
2 side of the other cuff?

3 A. I stated I was holding your left hand and arm down to the
4 ground with my cuff on it.

5 Q. I don't get it. That's two sides of a cuff. You got me
6 cuffed to the right hand or the left hand. Which one?

7 A. I have your left hand cuffed, your left hand is on the
8 ground, and I'm holding your left hand down. At this point
9 another officer got a cuff onto your right hand and we
10 eventually were able to, after you stopped fighting, to get the
11 two cuffs together to cuff you.

12 Q. So you never cuffed me to the machine.

13 A. No, sir, I pinned down your arm on the ground.

14 Q. How you manage to put that cuff on my left hand?

15 A. I was able to pry your arm out from underneath you and I
16 was able to get the one cuff from my -- my cuff onto your left
17 hand and secure your arm.

18 Q. But how? Which way? Behind my arm? How did you do that,
19 with my arm extended? How? Bent it?

20 A. Your arm was pretty much situated underneath your chest. I
21 was able to, you know, pry it out and extend it out like this
22 and then pin it down and cuff it.

23 Q. Was you there after I was already cuffed? Did you escort
24 me outside to the vehicle or to the sidewalk?

25 A. I was the officer that escorted you out to the sidewalk,

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Flynn - Direct

1 yes.

2 Q. And what happened then when you -- once you escorted me
3 outside?

4 A. I sat you on the curb. At this point Sergeant Kelly
5 radioed for an ambulance, so you received medical care.

6 Q. You didn't position me laying down first and then stood me
7 up and sat me down?

8 A. I sat you down, and on your own power, you kept trying to
9 lean to the side and lay down, and I kept sitting you up and
10 explained to you that you had a laceration over your eye, and
11 bleeding, by laying down it's going to make it worse, so I kept
12 having you sit up on the sidewalk.

13 Q. So you the one who escorted me by yourself or was it you
14 with the other officer?

15 A. From the store, you're saying? Officer Jones and I walked
16 you out.

17 Q. Can you give me a breakdown of everything that happened in
18 the store, in your own -- what you saw that day, the whole
19 incident? Do you have a quick summary for me and the jurors
20 and the judge, please?

21 MR. LICHTERMAN: Objection, your Honor.

22 THE COURT: Overruled.

23 THE WITNESS: Answer it? Okay.

24 A. Myself -- Sergeant Kelly went in first to the store,
25 Officer Reid was behind him, followed by myself. As soon as we

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Flynn - Direct

1 all walked in, I saw a gun being removed from the lower part of
2 Mr. Munoz' waistband, started coming up to air. At this point
3 Sergeant Kelly and Officer Reid were able to engage his wrists
4 to get control of the gun so he wasn't able to shoot anybody.
5 At this point I came and I grabbed him on his upper torso.
6 With a little brief struggle, couple seconds, we all fell down
7 to the ground. Sergeant Kelly landed on top of him, I landed
8 to the left, Sergeant Reid landed to the right. At this point,
9 to my knowledge, the gun obviously was in his hand so, you
10 know, we're just waiting for the gun to go off, so at this
11 point we're trying to get his hands free. While I'm trying to
12 get his left hand free, Sergeant Kelly's on top of him, to pin
13 him down so he can't get his chest up off the ground to pull
14 the gun out, and Sergeant Reid is, you know, trying to get his
15 hands in there to get wrist control for the gun so he couldn't
16 have the capability of squeezing it. So at this point, like I
17 said, you know, we're waiting for the gun to go off, because we
18 figure it's in his hand, it's eventually going to go off, so at
19 this point, you know, being feared for my own life and the rest
20 of the other officers, why -- I started striking Mr. Munoz in
21 his upper torso, his arm, and I'm trying to yank on his arm to
22 pry it out, so we can get the one hand secured so at least we
23 know the gun is not going to be, you know, in one hand.
24 Obviously it's going to be in the other hand. So at this
25 point, finally, after fighting for you, know, two, three, four

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1 minutes, like, you know, it was a struggle, we were able to get
2 the one hand out, or I got the one hand out, I was able to cuff
3 it and then secure it by like pretty much putting my whole body
4 weight on it. At this point I heard all, you know -- I don't
5 know exact timing, but Sergeant Reid said, oh, I got the gun, I
6 got the gun. At that point I was a little relieved 'cause,
7 thank god, you know, now it's a fair fight, you know, we
8 don't -- we're not taking our guns out, he's got a gun, so
9 we're able to finally subdue Mr. Munoz after a few minutes of
10 him still resisting without the gun, screaming and cursing at
11 us. We finally were able to get another cuff on his right
12 hand, and at this point we were able to get both hands behind
13 his back, and that was the whole -- pretty much the whole
14 struggle.

15 Q. Did I ever throw a punch at you?

16 A. At myself? I'm sorry.

17 Q. Did I ever throw a punch at you?

18 A. No, sir.

19 Q. Or kick?

20 A. You were kicking your legs and moving your torso.

21 Q. Did I kick you? Did I --

22 A. I don't know if you personally kicked me.

23 Q. Did I contact you, punch or kick?

24 A. I don't remember if you kicked me. You possibly could
25 have. I don't really remember exactly. But you never struck

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Flynn - Cross

1 me with your fists.

2 Q. Okay. Did I spit at you?

3 A. You were spitting. I don't --

4 Q. Did I spit at you? Did you --

5 A. Did I personally get hit? No.

6 MR. MUNOZ: I got no further questions, your Honor.

7 THE COURT: Thank you, Mr. Munoz.

8 Any cross-examination?

9 MR. LICHTERMAN: Yes, your Honor.

10 CROSS EXAMINATION

11 BY MR. LICHTERMAN:

12 Q. Good morning, Sergeant Flynn.

13 A. Good morning.

14 Q. Are you currently employed?

15 A. Yes, I am.

16 Q. And by whom?

17 A. The New York City Police Department.

18 Q. And what year did you begin working for the New York City
19 Police Department?

20 A. July 2005.

21 Q. And what's your current rank?

22 A. Sergeant.

23 Q. And what's your current command?

24 A. The first precinct.

25 Q. And do you have an assignment in the first precinct?

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Flynn - Cross

1 A. Yes. I'm the anticrime sergeant.

2 Q. And what's anticrime?

3 A. Pretty much a plainclothes unit, with unmarked vehicles.

4 We go out in plainclothes and we deal with either violent
5 crimes, robberies, shootings, larcenies, any kind of that
6 nature.

7 Q. And when were you promoted to the rank of sergeant?

8 A. May 2012.

9 Q. And what was your rank before you were a sergeant?

10 A. Police officer.

11 Q. And how many years were you a police officer?

12 A. Approximately six.

13 Q. In September of 2011 what was your rank?

14 A. Police officer.

15 Q. And what was your command at that time?

16 A. The 43rd precinct.

17 Q. And what was your assignment at that time?

18 A. I was an anticrime officer.

19 Q. Now I'd like to draw your attention to September 13th of
20 2011. Were you working that day?

21 A. Yes, I was.

22 Q. And were you working with anyone that day?

23 A. Yes. I had three partners for the day.

24 Q. And who were you working with?

25 A. Sergeant Kelly, Officer Reid, and Officer Jones.

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Flynn - Cross

1 Q. And had you worked with them prior to that occasion?

2 A. Yes. Every day.

3 Q. And what were you wearing that day?

4 A. I believe it was shorts and a T-shirt. It was warm out.

5 Q. And what police equipment did you have with you?

6 A. I had my radio, my handcuffs, my gun, and, thank god, my
7 vest that day.

8 Q. And when you say vest, you mean bulletproof vest?

9 A. Bulletproof vest, yes. I'm sorry.

10 Q. And did there come a time on September 13th of 2011 when
11 you had the occasion to respond to the bodega located at 1890
12 Archer Street?

13 A. Yes, sir.

14 Q. Had you been to that bodega before that occasion?

15 A. I had -- that bodega is a high-crime area, between
16 shootings, slashings, a lot of robberies in that neighborhood
17 of Parkchester, so we had been to that store before.

18 Q. Had you ever been to that bodega before due to drug sales
19 or purchases?

20 A. Yes, many times.

21 Q. And what brought you to that location on September 13th
22 of 2011?

23 A. There was a radio transmission for a larceny in the
24 neighborhood. Pretty much we were maybe a minute out or so,
25 and we decided to canvass in that neighborhood knowing that a

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Flynn - Cross

1 lot of the people who commit the crimes go to this location to
2 hang out or out front or they go in the store. I guess they
3 feel safe there because most of the time that's where they, you
4 know, commit their crimes.

5 Q. Now when you say canvass, what do you mean by that?

6 A. We'd get a description over the radio of a perpetrator or
7 like a -- what the person's wearing, skin color, height, where
8 the crime was taking place, a direction of flight if they ran
9 anywhere. Pretty much we'll just go out, you know, driving
10 around looking for someone that fits that description.

11 Q. So when you arrived at the bodega on September 13th of
12 2011, did you know that the perpetrator of the robbery was
13 inside?

14 A. No, I did not.

15 Q. And about how far away was the bodega from where the
16 larceny had occurred?

17 A. Maybe the equivalent of like four -- four blocks, maybe
18 like less than a quarter mile.

19 Q. And about how long after you heard the radio call about the
20 larceny did you arrive at the bodega?

21 A. Approximately maybe a minute and a half, maybe.

22 Q. And what did you do when you arrived at the bodega?

23 A. Sergeant -- I mean, sorry -- Officer Jones was driving the
24 vehicle, Sergeant Kelly was in the front seat, and myself and
25 Officer Reid were in the back. Officer Jones pulled up to

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Flynn - Cross

1 maybe about 40, 50 feet before the store, not right in front,
2 and we exited the vehicle, and Sergeant Kelly went in,
3 obviously proceeded in first, followed by Officer Reid,
4 followed by myself.

5 Q. And where was Officer Jones when you went into the bodega
6 along with Sergeant Kelly and Officer Reid?

7 A. He was still parking the car. He was the last one to come
8 out.

9 Q. And what did you observe when you walked into the bodega?

10 A. As soon as I walked in, like I said, I observed Mr. Munoz
11 at the counter. At this point I did observe a black firearm
12 coming up from his waistband area, and like I said, we were in,
13 one, two, three, right after each other. Sergeant Kelly and
14 Officer Reid were just pretty much about to engage him when I
15 was like directly behind them.

16 MR. LICHTERMAN: Your Honor, I'm showing the plaintiff
17 what's been previously marked as Defendant's Exhibit L for
18 identification.

19 MR. MUNOZ: Can I see it up closer, please.

20 I want to look at the logo. Can't see the logo of the
21 gun. Can I stand up, your Honor, just to see?

22 THE COURT: I think you should remain seated,
23 Mr. Munoz. It's being shown to you now.

24 MR. MUNOZ: It's --

25 THE COURT: Okay. Mr. Munoz, don't speak. You may

H311mun1

Flynn - Cross

1 look at it.

2 MR. MUNOZ: Okay, your Honor. Thank you.

3 THE COURT: Thank you, Mr. Munoz.

4 MR. LICHTERMAN: May I approach the witness, your
5 Honor?

6 THE COURT: Yes.

7 MR. MUNOZ: Your Honor?

8 THE COURT: Excuse me, Mr. Munoz.

9 MR. LICHTERMAN: I'm showing the witness the exhibit
10 previously marked for identification as Defendant's Exhibit L.

11 BY MR. LICHTERMAN:

12 Q. Sergeant Flynn, do you recognize this exhibit?

13 A. Yes, I do.

14 Q. And what do you recognize it to be?

15 A. That was the gun I observed which Mr. Munoz had in his hand
16 prior to us approaching him.

17 Q. And how do you know that's the gun that Mr. Munoz had on
18 the date of the incident?

19 A. Well, not only did I see him with it, I'm the one who
20 vouchered it.

21 Q. When you say voucher, what do you mean by that?

22 A. Excuse me. That's our -- our departmental procedure, as in
23 everything gets itemized on a list, typed up on a computer, you
24 know, each item gets individually documented saying, you know,
25 what it is, you know, the color, the make, the serial number.

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Flynn - Cross

1 In this case I have the serial number. So that's, you know,
2 our vouchering process.

3 Q. And is it the same or substantially the same condition as
4 it was the last time you saw it?

5 A. Yes.

6 MR. LICHTERMAN: Your Honor, I'd like to offer
7 Defendant's Exhibit L into evidence.

8 THE COURT: Received.

9 (Defendant's Exhibit L received in evidence)

10 Q. Sergeant Flynn, can you stand and demonstrate for the jury,
11 using the exhibit that you're now holding, how plaintiff pulled
12 the gun out when you walked into the bodega.

13 A. Like I say, when I -- when I was in the store, I'm not sure
14 if it came out of his pocket or his waistband, but he was in
15 the process pretty much from my waist -- his waist, coming up
16 like this, pulling the waist up -- pulling the gun to shoulder
17 height.

18 Q. And how far away from the plaintiff were you when you
19 observed him pull out the gun like that?

20 A. Maybe 6, 8 feet, approximately.

21 Q. Is that roughly the distance between you and the jury box?

22 A. Yeah. I'd say maybe an extra -- maybe the first juror.

23 Q. Now at the moment that you saw plaintiff pull out the gun,
24 what were you thinking?

25 A. Someone's getting shot.

H311mun1

Flynn - Cross

1 Q. And did you say anything to the plaintiff at that point?

2 A. No. I didn't have a chance. Like I said, thank god these
3 two officers were able to grab his arm right away and try to
4 control his movement, and I -- since they had his arm, I was
5 just trying to grab his upper body because, you know, he was
6 torquing and trying to twist.

7 Q. And why didn't you draw your own weapon at that point?

8 A. It was pretty much a safety -- we didn't have time, number
9 one, and number two, it was a safety issue. There's two
10 officers there, there's two employees there. You know, natural
11 reaction isn't to take out a gun. I mean, you see someone with
12 a gun, you just -- your first reaction is to just grab him, you
13 know, and especially in that situation, the close quarters it
14 was, it wasn't a big, big area we were in, so, you know,
15 instead of having one gun already out, there's no point in
16 taking another gun out.

17 Q. And when you said there wasn't enough time for you to draw
18 your weapon, can you just explain what you mean by that.

19 A. I -- from the time we stepped into the store, Sergeant
20 Kelly and Officer Reid stepped into the store, to the time I
21 was there, you're talking about less than two, three seconds.
22 There's no time to take out your firearm and engage or, you
23 know, hands up, freeze, you know, don't move. You just -- it
24 was physically impossible.

25 Q. Now could you demonstrate for the jury, using Defendant's

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Flynn - Cross

1 Exhibit L, how long it would take to move the gun from where
2 you saw plaintiff holding it to where it would be in a position
3 to have shot you.

4 A. Would you like me to point it somewhere or can I point it
5 at the wall? I know it's not loaded, but I don't want to point
6 a gun at somebody.

7 Q. Use the wall.

8 A. So pretty much just -- if he was holding it here, just go
9 like that.

10 Q. Is that what you mean when you said you didn't have time to
11 draw your own weapon?

12 A. Exactly. That's less than a second. If I just hold the
13 gun here and just go like that, you know, within less than a
14 second, you could shoot somebody and kill, kill somebody.

15 Q. Now when you say that you grabbed plaintiff's upper torso,
16 what was the purpose of that?

17 A. Just to try to restrain his upper body because, you know,
18 he is a shorter man, but the guy is -- Mr. Munoz, I'm sorry --
19 is a very powerful man, very strong individual, so when they
20 had his arm, you know, he was still able to move his upper
21 torso. We were trying to limit all of his mobility so that he
22 had no option to go anywhere, his, you know, pretty much -- god
23 forbid he tried to run or was able to escape and shoot one of
24 us.

25 Q. And what was the plaintiff doing while you were grabbing

H311mun1

Flynn - Cross

1 his upper torso?

2 A. He was verbally yelling, along the lines, you're gonna have
3 to kill me, I'm not going back to jail, and obviously fighting.

4 Q. And how did he fight?

5 A. Since his right arm was being immobilized by Sergeant Kelly
6 and Officer Reid, pretty much just trying to get free at that
7 point when we were standing.

8 Q. And did there come a time when you fell to the ground with
9 him?

10 A. Yes, we all fell to the ground.

11 Q. And where was the plaintiff on the ground?

12 A. He landed pretty much face -- face down or chest down.

13 Q. And where did you land?

14 A. I landed onto the -- it was like left upper body part, or
15 torso area.

16 Q. And did any part of your body or your weight fall on top of
17 the plaintiff?

18 A. I'd say probably three quarters of my weight fell on him.

19 Q. And where did Sergeant Kelly fall to the ground?

20 A. Directly on top of him.

21 Q. And did you observe Sergeant Kelly's body weight
22 specifically on top of the plaintiff?

23 A. Yes. I knew he was direct -- Sergeant Kelly was directly
24 next to me so his body weight did fall on top of him.

25 Q. And can you demonstrate for the jury, using Defendant's

H311mun1

Flynn - Cross

1 Exhibit L, where plaintiff had the gun when he fell to the
2 ground.

3 A. Pretty much when he, you know, when we were fighting with
4 him on the ground, he was -- he had the gun at some point
5 obviously face down on the ground like this, with both hands
6 underneath him.

7 Q. If you can stand up to --

8 A. Sorry. You can't -- so pretty much he had the gun, two
9 hands were underneath his chest, and his body was pushing down
10 on the gun like this.

11 Q. And that's where the gun was when you and Sergeant Kelly
12 landed on top of him?

13 A. Yes. He fell directly like this, both hands underneath
14 him.

15 Q. Now what did the plaintiff do once he was on the ground?

16 A. Like I said, besides yelling, you know, at that point his
17 arms were underneath him, so he was pretty much kicking, trying
18 to contort out, you know, shifting his body out, spitting, like
19 I said, yelling, cursing. Pretty much at that time, he refused
20 to give us hands. Multiple times we said, give us your hand,
21 five us your hand, and he refused and refused. He would not
22 budge those hands out from underneath his chest.

23 Q. And what were you thinking at this point?

24 A. Someone's going to get shot or at least the gun was going
25 to go off and hopefully miss somebody, you know, but, you know,

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Flynn - Cross

1 when your head's down to the ground and the gun's pretty much
2 level with your head, you're just waiting for the loud bang to
3 go off at some point, but thank god it didn't.

4 Q. What were you focused on doing at that point?

5 A. Getting his left arm out from underneath his body.

6 Q. And so what did you do to try and get the left arm out from
7 underneath his body?

8 A. I was punching his upper left shoulder, the back blade,
9 punching his back of his arm, tricep, you know, trying to
10 loosen it up so I could be able to pry out the arm from
11 underneath him.

12 Q. And why was it important to pry the left arm out from
13 underneath his body?

14 A. Well, I knew he fell with the gun in his right hand but I
15 don't know if underneath him he could have switched it at any
16 point, you know, so you just want to -- pretty much your
17 ultimate goal is just to secure, get his arm, you know,
18 isolated so that he can't, you know, use it, you know, as a
19 weapon against us, whether he had the gun or not, his hand,
20 so -- and it's easier to cuff. Once you get one arm, now he
21 only has one hand to fight with.

22 Q. Were you worried about any other possible weapons
23 underneath him?

24 A. I wasn't sure. I know some -- some items fell on the
25 floor, so I didn't know if there was glass or anything like

H311mun1

Flynn - Cross

1 that, but at that point my main concern was myself or my fellow
2 officers getting -- or even Mr. Munoz getting shot, you know,
3 that was it.

4 Q. And what was your impression of plaintiff's mental state at
5 that point?

6 A. During all this, he had to be on some kind of narcotics,
7 not just because he was being irate and, you know, yelling, but
8 the strength; he had the strength of like ten men. It was
9 pretty scary at some points.

10 Q. And after you were striking the plaintiff and trying to
11 pull his arm out, what happened?

12 A. Eventually I was able to get free his left arm. Like I
13 said, it was a lottery leap, because at that point I knew he
14 didn't have the gun in that hand, so like I said, eventually I
15 was able to get my cuffs out and cuff his one hand, his left
16 hand, and at that point I knew the other officers were on the
17 other side still trying to disarm him, so I just laid all my
18 body weight on top, I just pretty much pinned that arm down.
19 That was my goal, just pin that arm down so it couldn't come
20 free.

21 Q. What was the purpose of pinning down the left arm?

22 A. Well, this way he can't pull it back under, and if he did
23 want to switch hands up with the gun or, you know, he couldn't
24 either, you know, try to get up and push off or something like
25 that, but, you know, it's easier to fight someone with one hand

H311mun1

Flynn - Cross

1 or one arm than it is with two arms.

2 Q. And what was the plaintiff doing while you had his left arm
3 pinned to the ground?

4 A. Still yelling, screaming, you know. At that point, when I
5 was actually punching Mr. Munoz' upper torso, Officer Jones was
6 there with Officer Reid trying to dig in from -- pretty much
7 Officer Jones was maybe by -- would be by his head, and he was
8 trying to dig into his right side to get the gun as well, and
9 at that point I saw -- observed Mr. Munoz bite Officer Jones.

10 Q. And where did you see Mr. Munoz bite Officer Jones?

11 A. On his hand.

12 Q. And what did you do at that point?

13 A. Oh, I still -- like I said, I still had my job to do. I
14 still contained that arm. I pried that arm, you know, that was
15 my thing. Eventually I got it out, you know, I just secured
16 it.

17 Q. And did there come a point when plaintiff stopped
18 resisting?

19 A. Eventually, yes.

20 Q. And when did that happen?

21 A. Even after the gun was removed from him, he was still
22 fighting and, you know, putting up a fight with us.

23 Q. And did there come a time when the plaintiff was eventually
24 handcuffed?

25 A. Yes, sir.

H311mun1

Flynn - Cross

1 Q. And how was plaintiff handcuffed?

2 A. Like I said, I had the one handcuff already on his left
3 arm, we were able to get the other arm out and put a handcuff
4 on that and use the dual set of cuffs, which this way you don't
5 have to pull the defendant's arm so close and tight, you know,
6 you're able to cuff him still, but there was still enough room
7 that you didn't have to keep fighting his hands, you know, to
8 pull them together.

9 Q. Now after plaintiff was in handcuffs, did you punch him?

10 A. Absolutely not.

11 Q. And after plaintiff was in handcuffs, did you observe
12 anyone else punch him?

13 A. Absolutely not. No one touched him.

14 Q. Was any force whatsoever used against plaintiff after he
15 was placed in handcuffs?

16 A. Absolutely not.

17 Q. Now what happened after plaintiff was in handcuffs?

18 A. After we stood up, pretty much catch our breath, it was --
19 the bodega wasn't air conditioned. It was very hot. We just
20 struggled for two or three minutes. Myself, I stood him up
21 with Officer Jones, and we proceeded out to the -- in front of
22 the store to the sidewalk.

23 Q. And when you and Officer Jones walked the plaintiff outside
24 of the store, where was Officer Reid and Sergeant Kelly?

25 A. They were probably outside the store at that point, like,

H311mun1

Flynn - Cross

1 you know -- like I said, we were all trying to catch our
2 breath, pretty much had a -- we just fought with somebody for,
3 like I said, three or four minutes, and not only was it a
4 physical, it was kind of a -- a mental draining too. You're
5 fighting somebody with a gun. So everyone was just trying to
6 get their bearings together, you know, and here we focused on
7 the next -- the next task we had.

8 (Continued on next page)

H3L8MUN2

Flynn - Cross

1 Q. How did you feel at the end of this struggle?

2 A. Relieved that, you know, thank God myself or my partners
3 didn't get shot, there were two workers in there, or that Mr.
4 Munoz didn't get shot. It was relief that thank God the gun
5 was recovered and he was handcuffed.

6 Q. Did there come a time when you learned that the gun was
7 loaded?

8 A. Yes.

9 Q. When did you learn that?

10 A. When I got back from the hospital.

11 Q. How did you learn that it was loaded at that point?

12 A. Sergeant Kelly gave me the firearm with the bullets.

13 Q. Now, once plaintiff was outside in handcuffs, what
14 happened?

15 A. We sat him on the sidewalk. At this point, Sergeant Kelly
16 called for an ambulance via radio.

17 Q. Did an ambulance come?

18 A. Yes, it did.

19 Q. What happened when the ambulance arrived?

20 A. Prior to that as well, we actually called for backup,
21 because there was a little bit of a crowd outside gathering.
22 So at this point marked vehicles did show up on the scene to
23 help kind of escalate -- the crowd, move them out, so we had
24 enough room to have an ambulance come in, back the crowd up and
25 everything.

H3L8MUN2

Flynn - Cross

1 Q. What happened when those other vehicles arrived?

2 A. One of the vehicles that came was a marked van with two
3 officers and a complainant actually -- the complainant from the
4 earlier larceny was in the back of the van.

5 Q. Did you speak with the victim?

6 A. At first I only spoke with the officer. I do remember the
7 victim pointing out the back window yelling, saying, that's the
8 guy, that's the guy.

9 Q. How old was the victim?

10 A. I believe he was 86 years old.

11 Q. What happened after the victim had pointed out the
12 plaintiff?

13 A. At some point he was searched and recovered Mr. LaCourt's
14 wallet from the defendant.

15 Q. When you say the defendant?

16 A. Mr. Munoz, yes.

17 Q. Mr. Munoz have the victim's wallet on him?

18 A. Yes, in his jeans pocket.

19 Q. It was found when Mr. Munoz was searched?

20 A. Yes. Prior to getting out to the ambulance, we gave him a
21 search to make sure he had no other contraband or any kind of
22 weapons on him.

23 Q. Was anything else found during that search?

24 A. He had a crack pipe or a glass pipe containing black
25 tar-like residue.

H3L8MUN2

Flynn - Cross

1 Q. Was the plaintiff transported in the ambulance?

2 A. Yes, he was, by EMS, as well as Officer Jones and myself
3 went in the ambulance as well.

4 Q. What happened in the ambulance?

5 A. The defendant was still being irate, cursing, yelling,
6 wasn't being cooperative with the medical personnel who were
7 trying to clean up his eye a little bit. He stated at some
8 point, that's a loaded gun, that's a felony, I'm going back to
9 jail.

10 Q. Where was plaintiff taken in the ambulance?

11 A. To Jacobi Hospital.

12 Q. What happened at Jacobi Hospital?

13 A. We escorted Mr. Munoz in. At that point ER, they were able
14 to get him a bed to situate him in because he was acting so
15 irate and cursing, yelling, using racial slurs at the staff and
16 other officers that were there. They were able to get him a
17 bed and finally subdue him.

18 Q. What was plaintiff yelling during this time?

19 A. Just cursing, like I said, using profanity, racial slurs,
20 which I'm not going to repeat, but things that were
21 inappropriate for a public hospital.

22 MR. LICHTERMAN: May I have just one moment, your
23 Honor?

24 Nothing further, your Honor.

25 THE COURT: Mr. Munoz, did you have additional

H3L8MUN2

Flynn - Redirect

1 questions for this witness?

2 MR. MUNOZ: Yes, ma'am.

3 REDIRECT EXAMINATION

4 BY MR. MUNOZ:

5 Q. When we was in the hospital, didn't I took out a glass pipe
6 out of my sneaker and gave it to you?

7 A. No, because you wouldn't be digging in your shoes at the
8 hospital. That glass pipe was removed before you were in the
9 hospital, you get searched. You wouldn't be able to go in your
10 sneakers while you're in custody. You were still handcuffed.
11 Your hands were never free in the hospital.

12 Q. So I had both hands cuffed or one only?

13 A. When you first walked into the hospital, you had both hands
14 cuffed.

15 Q. I am talking about in the bed.

16 A. In the hospital, you had one hand cuffed to the bed, but at
17 that point your shoes would have been off already. The
18 hospital staff would have removed your clothing from you.

19 Q. Before my shoes was on, I had given you a glass pipe, you
20 don't remember?

21 A. The glass pipe was removed from the scene. There is no way
22 possible we would have let you gone in your own shoes and dug
23 through your shoes. If anything, we would have taken your
24 shoes off and found it.

25 Q. Didn't I tell you, here's a glass pipe, don't put that as a

H3L8MUN2

Flynn - Redirect

1 charge?

2 A. Not to me, you did not, sir.

3 Q. Was you sitting next to me or close to me on that hospital
4 bed?

5 A. I was right next to your hospital bed.

6 Q. Wasn't you the one who was giving me water in the medicine
7 cup when I asked you to give me water?

8 A. When you're at the hospital, we don't distribute any
9 medication or water to you. It would be the hospital staff.

10 I'm not a doctor.

11 Q. You never gave me water then?

12 A. At the hospital I don't believe I gave you water.

13 Q. I remember it was you.

14 THE COURT: I'm sorry. Mr. Munoz, this is not your
15 chance to testify.

16 The jury should disregard.

17 Do you have a question to place to the witness?

18 Q. When you removed the wallet, you was the one who did me the
19 search?

20 A. I believe Sergeant Kelly removed the wallet from you.
21 Yesterday he testified he took the wallet out.

22 Q. So you happen to know the sum in the wallet, the sum of
23 currency?

24 A. At some point, yes, briefly, after I did find out how much
25 money was in the wallet or on your person, or was missing from

H3L8MUN2

Flynn - Redirect

1 the complainant.

2 Q. How much money was it?

3 A. I believe it was approximately \$195.

4 Q. Can you remember the racial remarks I said that day?

5 A. I do. Would you like me to repeat them?

6 Q. Yes. I would like for everybody in this courtroom, please.

7 A. It's fine. I really don't want to say it, but you were
8 calling Officer Reid a nigger.

9 Q. You're sure I didn't say gay?

10 A. That's not a racial slur, gay.

11 Q. That was the only thing, as far as from your knowledge, you
12 remember me saying as a racial remark?

13 A. Racial slurs, yes, the "N" word was the only one you were
14 racially saying, yes.

15 Q. Didn't you say I said also racial remarks in the hospital?

16 A. I just stated, yes, that's what you said in the hospital.
17 You were using the "N" word in the hospital towards Officer
18 Reid and the staff.

19 Q. So Officer Reid was also in the hospital?

20 A. Eventually he showed up with Sergeant Kelly and himself
21 showed up at the hospital, yes.

22 Q. Didn't I fell out in the hospital?

23 A. Not right away. They didn't sedate you for probably close
24 to an hour afterwards.

25 Q. So was Officer Reid there before or after they sedated me?

H3L8MUN2

Flynn - Redirect

1 A. He was there before you were sedated, sir.

2 Q. So I never said any racial remarks to anybody in the
3 hospital besides, as you say, Sergeant Reid?

4 A. No. You did to the staff. There were people walking past
5 and you were yelling racial slurs out loud.

6 Q. I asked you, can you mention them? You said, nigger. I
7 asked you to mention all the racial slurs. I would like to
8 hear them. Also, I would like the jurors to hear it. And,
9 also, I would like the Honorable Ms. Denise Cote, please. I
10 would like everybody to hear what were all the racial slurs.

11 A. I just said the racial slur was the "N" word, yes, you were
12 using the "N" word. The racial slur was the "N" word.

13 Q. So I said that to everybody in the hospital besides Officer
14 Reid?

15 A. If a person who was African American was walking past you,
16 you were yelling that, yes.

17 Q. There were also doctors, black doctors walking around,
18 because the word nigger is for black people?

19 A. I'm aware what it's for, but no one really uses that
20 nowadays. There were nurses there that were of
21 African-American descent, and you were yelling out loud and you
22 were offending them, as well as other people that were sitting
23 there waiting to get medical attention.

24 Q. Do you know the name of that nurse?

25 THE COURT: So, Mr. Munoz, shall we move on to the

H3L8MUN2

Flynn - Redirect

1 next topic?

2 Q. When Sergeant Kelly gave you the firearm, as you say you
3 vouchered it, do you have a serial number for that, and how
4 many rounds did it have?

5 A. My recollection, there were two rounds with the firearm.

6 The serial number to the firearm you're asking? It
7 would be on the voucher. I don't remember off the top of my
8 head. Or it's on the firearm, if you would like me to read it.

9 Q. Can you give a description of the two rounds to the juror
10 and the judge, please.

11 THE COURT: So let me just make clear again. I don't
12 think anyone is confused. But all the fact issues are for the
13 jury. My role is just to make rulings of law.

14 So please give your testimony to the jury.

15 THE WITNESS: I'm sorry.

16 A. Two .380 caliber bullets. There is a live cartridge, a
17 shell, a firing mechanism on it, regular bullet, but the
18 caliber was a .380.

19 Q. So you're saying that a .380 caliber bullet could fit into
20 a .38, that's what you're saying?

21 A. I apologize. A .38. .380, .38.

22 Q. So now it's .38 bullets instead of .380?

23 A. Mr. Munoz, it was an oversight. I meant to say a .38
24 revolver.

25 Q. Didn't the firearm have tissue around the handle?

H3L8MUN2

Flynn - Redirect

1 A. No. It never had tissue around the handle.

2 Q. Didn't you bend my arms and made me touch the firearm for
3 fingerprints?

4 A. Absolutely not.

5 Q. What do you remember inside the wallet?

6 A. The thing that stands out most is the complainant had a
7 lucky two dollar bill that was stuffed in one of the slots of
8 the wallet, which Mr. Munoz obviously didn't know it was in
9 there because it was left in there. So when we did open the
10 wallet, besides having his own personal information in there,
11 he was able to identify the wallet, 100 percent positive,
12 because that was his lucky two dollar bill he had. I think he
13 told me his father gave it to him early in his life.

14 Q. So you're saying that the sum is how much, how much
15 currency he had in his wallet?

16 A. It was approximately \$195, plus the two dollar bill.

17 Q. From your knowledge?

18 A. To my knowledge, yes.

19 Q. So you're saying he also had valid IDs in there. Can you
20 explain specifically what IDs he had?

21 A. I don't recall exactly what IDs he had on him, sir.

22 Q. So how can you know he had ID in his wallet if you can't
23 recall what type of ID he had in his wallet?

24 A. It's almost six years ago. I don't remember exactly what
25 he had in his wallet, but his personal identification was in

H3L8MUN2

Jones - Direct

1 the wallet.

2 Q. You know which one then?

3 A. I don't remember exactly what credit cards or New York
4 state ID he had on him, sir.

5 Q. You're saying there was a lucky two dollar bill. Do you
6 remember the rest of the bills he had? Were they 10s, 20s,
7 50s, 100s?

8 A. I don't remember the denominations, whether he had like
9 50s, 20s, I don't remember the exact number of bills he had.
10 To my knowledge, it was approximately \$195.

11 Q. What is code 32, sir?

12 A. That's a larceny in progress, sir.

13 Q. So when you got the code 32, was a weapon involved, did it
14 say gun involved or no gun, no weapon? What was the Sprint
15 code and the code 32?

16 A. To my knowledge remembering, I don't remember there being a
17 weapon involved on the Sprint.

18 Q. So it was a larceny, right?

19 A. A 32 is a larceny, yes, in progress.

20 Q. So here we go again. A larceny is no weapon involved?

21 A. Penal law definition, yes.

22 MR. MUNOZ: I have no further questions.

23 Thank you, Sergeant Flynn.

24 THE WITNESS: Thank you, Mr. Munoz.

25 THE COURT: Any further questions, recross?

H3L8MUN2

Jones - Direct

1 MR. LICHTERMAN: No, your Honor.

2 THE COURT: You may step down.

3 (Witness excused)

4 THE COURT: Mr. Munoz, do you have an additional
5 witness to call?

6 MR. MUNOZ: I would like to call Officer Jones,
7 please.

8 THE COURT: Officer Jones, if you would take the
9 stand, please.

10 Take the stand and remain standing.

11 STEPHEN JONES,

12 called as a witness by the plaintiff,

13 having been duly sworn, testified as follows:

14 THE COURT: State your full name and spell your last
15 name for the record.

16 THE WITNESS: Detective Stephen Jones, J-O-N-E-S.

17 DIRECT EXAMINATION

18 BY MR. MUNOZ:

19 Q. Good morning, Officer Jones.

20 A. Good morning.

21 Q. When you received you bit mark, when I bit you in your
22 hand, can you give a description of what the injury looked
23 like? Can you give us a description of that bite mark that I
24 gave you?

25 A. It was about the size of a half dollar coin, between that

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Jones - Direct

1 and a quarter. It was pretty deep. It went down to the flesh.
2 It was red, it was bleeding. It was gruesome. It was an ugly
3 bite.

4 Q. Did you ever have a photocopy of it?

5 A. I believe they took a picture, but I don't have a personal
6 copy of it.

7 Q. Did you get stitches for it?

8 A. No. They said not to stitch it. It was too wide. It was
9 more of just like, almost like if you had a spoon and you kind
10 of dug out something, instead of a sharp slash. I was really
11 just concerned that --

12 THE COURT: Don't add.

13 THE WITNESS: OK.

14 THE COURT: You may be asked a further question.

15 MR. MUNOZ: Your Honor, with your permission, is it
16 possible that Officer Jones could show his arm where I bit him
17 at?

18 THE COURT: Absolutely.

19 Officer, if you could stand where you are and display
20 the area of your body where the bite was.

21 THE WITNESS: You can't really see it too much. It
22 healed up, thankfully. But right there is a discoloration
23 underneath the hair on my arm. It healed though. I'm left
24 with a small scar.

25 MR. MUNOZ: Your Honor, he is showing it at a

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Jones - Direct

1 distance. The jurors can't see that.

2 THE COURT: Officer Jones, if you would step down from
3 the witness stand, walk slowly in front of the jury, displaying
4 to them the area of your body that has the wound, and you may
5 point to it with your other hand.

6 Don't talk to them.

7 MR. MUNOZ: Your Honor, can I see also?

8 THE COURT: Absolutely.

9 BY MR. MUNOZ:

10 Q. Officer Jones, can I see where I bit you at?

11 THE COURT: Officer Jones, could you please approach
12 the plaintiff's table and display your hand to him.

13 Thank you, Officer Jones. You may retake the stand.

14 Q. Officer Jones, does that look like a spoon carved out your
15 hand, as you said?

16 A. It was six years ago. It was an ugly wound.

17 Q. I see a little dot.

18 THE COURT: I'm sorry. Mr. Munoz, it's not your time
19 to testify. Just ask a question.

20 MR. MUNOZ: Your Honor, can I exhibit the picture that
21 I have of Officer Jones' bite mark?

22 THE COURT: I am going to ask my law clerk to approach
23 and retrieve the document from you and walk up and show that
24 document to the witness. I believe that is Plaintiff's Exhibit
25 4. You may leave that with the witness.

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Jones - Direct

1 Officer Jones, you're being shown a document that is
2 marked Plaintiff's Exhibit 4.

3 You may place a question, Mr. Munoz, to the officer.

4 BY MR. MUNOZ:

5 Q. As you see, it's dark. Does that look really more like
6 your wrist than your forearm?

7 THE COURT: OK. Are you asking Officer Jones whether
8 he recognizes what is in Plaintiff's Exhibit 4?

9 MR. MUNOZ: Yes, ma'am. I already explained it to
10 him.

11 THE COURT: But the testimony has to come from him.

12 MR. MUNOZ: OK.

13 THE COURT: Officer Jones, do you recognize what is
14 shown in Plaintiff's Exhibit 4?

15 THE WITNESS: No.

16 THE COURT: You may just leave it there.

17 Q. So I didn't bit you in the forearm?

18 MR. LICHTERMAN: Objection.

19 THE COURT: Mr. Munoz, overruled.

20 You want to know from Officer Jones whether you bit
21 him in the forearm, is that right?

22 MR. MUNOZ: That's right, ma'am. I apologize.

23 THE COURT: So, Officer Jones, did the plaintiff bite
24 you in the forearm?

25 THE WITNESS: No.

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Jones - Direct

1 Q. And you don't have a copy, and you're an officer?

2 THE COURT: A copy of what?

3 Q. You don't have a copy of the bite mark that I presented to
4 you, but I have a copy that's not clear, but you don't have
5 one. So you don't have a copy then?

6 THE COURT: Mr. Munoz, a simple question, just one
7 question at a time.

8 Do you have a copy, Officer Jones, of a picture of
9 your bite mark?

10 THE WITNESS: No.

11 Q. Can you explain to the Court, the jury, the judge and
12 everybody in here a summary of your story of what happened that
13 day during the incident of September 13, 2011?

14 A. Yes. We received a call for a 32 in progress, items taken,
15 wallet taken.

16 THE COURT: Move the mic closer to you and keep up
17 your voice.

18 A. A wallet taken.

19 We were canvassing the area of Archer and White
20 Plains. We started to go towards 1890 Archer Street, which is
21 a problematic bodega in the area, in the Parkchester section,
22 where the robbery occurred.

23 I had to make a right on to the street. I was
24 driving. I was with Sergeant Reid, who was an officer then,
25 Sergeant Kelly, and Sergeant Flynn who was also an officer

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Jones - Direct

1 then.

2 They exited the car first when I turned on to the
3 block just because there were a couple of cars building up. So
4 they got out first, and I was going to stay in the car to park
5 it closer to the location in case I needed to use the car
6 again, just in case of any scenario.

7 I finally parked the car. I entered the bodega. When
8 I entered the bodega, to my right Officer Flynn, Officer Reid
9 and Sergeant Kelly were on top of Mr. Munoz, violently fighting
10 with him. It was a violent struggle.

11 As I'm walking in, I hear one of the officers, I'm not
12 sure who it was, saying, He's got a gun, he's got a gun. He
13 was on his stomach, meaning Mr. Munoz, with his right arm
14 clenched extremely tight against the floor. So assume the gun
15 was in his right hand. Mr. Munoz is screaming at the top of
16 his lungs, You're going to have to kill me. I'm not going
17 back. I get down from my crown.

18 So the other officers are on top of him, and I see his
19 right arm clenched. So I go behind Mr. Munoz over his right
20 shoulder. I try to dig my arm over his right shoulder, and I
21 get to the top of his hand. I could feel he is clenching on to
22 something. I try to yank it. Then I feel this excruciating
23 pain on my wrist. I have never been bit before so I didn't
24 really know what it was. Then I looked down and I see he's
25 biting me. I stand back up to get my bearings. I look down

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Jones - Direct

1 and my wrist is bleeding. He's bleeding. I am thinking maybe
2 I'm going to get HIV. There are so many thoughts going through
3 your head. It was a scary situation.

4 Then I proceeded to get back into trying to take the
5 gun away from him and get him handcuffed. So I go down. I
6 strike him maybe five to ten times in the ribs. I am doing
7 this because the person is a lot stronger when they have their
8 arms close to them, and he's an extremely strong person just
9 with natural ability and being, as he said, on crack for three
10 days, he was almost superhuman. So I was figuring if I punched
11 him in the ribs, I can get an arm maybe to pop out. When
12 someone's arm is out at their side, they're a lot easier to
13 control just because you have less strength when you're prone
14 like this.

15 We were eventually able to get him handcuffed, when he
16 was still violently struggled. We got him handcuffed and
17 brought him outside.

18 Q. Thank you, Officer Jones.

19 Now, another question. Do you remember who cuffed me?
20 A. I don't. I mean, it could have been me. It could have
21 been any one of the officers. But when you have four officers
22 together and everybody is trying to get an arm, it could have
23 been two people pulling on one arm and putting on a cuff. It
24 was so chaotic, I don't remember that part.

25 Q. Besides the bit mark, did I strike a punch at you?

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Jones - Direct

1 A. No.

2 Q. Was I screaming as I was hitting you?

3 A. You were screaming.

4 Q. Obviously, was it a scream of pain?

5 A. No, it was a scream of rage, in my opinion. In my opinion,
6 if you were able to get up, you were going to hurt us, shoot
7 us. You wanted to get out of there at all costs and it didn't
8 seem like we mattered.

9 Q. When you were striking the blows on me, can you give us a
10 demonstration how you was hitting me?

11 A. I was punching him in the ribs, hard. We were fighting for
12 our lives. He leans up to the left six inches, he could have
13 easily shot one of us.

14 Q. So as a trained officer, it's easy to go like this, but as
15 a person who is not trained to use a firearm, isn't it not easy
16 to go just like that?

17 THE COURT: Excuse me. You're gesturing, so the court
18 reporter isn't going to be able to understand what you have
19 just done.

20 Q. It's easy as a trained officer to pull out a firearm and
21 shoot in all different type of angles, am I correct?

22 A. No.

23 Q. So you was never trained how to shoot a firearm?

24 A. I was.

25 Q. How about a person who is never trained, isn't that kind of

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Jones - Direct

1 different?

2 THE COURT: So place the next factual question to the
3 witness.

4 Q. You say you were punching me in the ribs?

5 A. Yes.

6 Q. What side of the ribs?

7 A. Right side.

8 Q. Not the left?

9 A. I'm not sure. I may have punched you in the left.

10 Q. Was you punching me when I was on the ground, as Sergeant
11 Flynn said, when I had both of my arms on my chest with the gun
12 facing down, was you still punching me on my ribs?

13 A. If you were on the ground, I was punching you in the ribs.

14 Q. Did you never strike me as I was standing up?

15 A. Sorry. I don't understand the question.

16 Q. Was you striking me as I was standing up with the firearm
17 supposedly shoulder length?

18 A. When I entered the bodega, you were already on the ground.
19 I was the last one in.

20 Q. So you was the last one so you didn't come in with at the
21 time Officer Flynn and Officer Reid at the time?

22 A. No.

23 Q. So you're the last one. So you're the fourth guy coming
24 inside the store?

25 A. Yes.

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Jones - Direct

1 Q. So if you was the last guy, how couldn't you have drawn
2 your gun and say freeze, when all officers are on top of me, if
3 I still had the firearm?

4 A. If I would have pulled out my firearm, my officers, my
5 partners on top of him, we would have gained nothing. I would
6 just be standing there with my firearm. I couldn't have shot
7 or used it.

8 Q. So you also didn't identify yourself as a NYPD officer,
9 right?

10 A. I was wearing my uniform, my vest, my gun, my radio. I had
11 my shield out. At that point, it would have made no difference
12 to identify myself. You were already engaged with these other
13 officers fighting.

14 Q. I thought anticrime wear plain clothes?

15 A. I was.

16 Q. That's not NYPD uniform. It's a difference between a NYPD
17 officer uniform and anticrime plain clothes uniform. So am I
18 correct that anticrime uniform, it could be any casual clothes?

19 A. Yes.

20 Q. Do you know who cuffed me?

21 A. Officer Flynn said he had your left arm. I'm not sure who
22 ultimately got his right arm and put both of them together.

23 Q. So when you was the last guy, which is the fourth guy
24 because it's four of you, coming inside the scene and you see
25 three officers, I believe almost six feet and better, except

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Jones - Direct

1 for Sergeant Kelly, I think he is a little shorter, and you see
2 three guys pinning me down, you decide to hit me on the ribs
3 instead of going for my arms, instead of going for my hands
4 too?

5 A. I tried to remove your arms and you were violently
6 struggling. The situation was not under control. Three
7 officers -- you know, it would could have been five officers.
8 The way you were violently struggling, this was a fight, this
9 was a real fight-for-your-life situation.

10 Q. So you see three officers weighing over 200 pounds on top
11 of me, why couldn't you call for more backup?

12 A. I had to get in there and help them.

13 Q. So you couldn't call for backup?

14 A. I could have.

15 Q. You could have. Why didn't you?

16 A. Because I felt we would be able to handle the situation
17 eventually. It was going to be a struggle.

18 Q. Don't you think if you would have called more backup, more
19 guys on top of me, that would have never happened?

20 A. It also would have been a lot more officers in a really
21 small space. It was already a really tight space in a bodega.
22 Another five officers crowding into it, it wouldn't have helped
23 us.

24 Q. Don't you think a small area with more officers is harder
25 for me to move?

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Jones - Direct

1 THE COURT: So I am going to ask you again, Mr. Munoz,
2 do you have a fact question to place to this witness?

3 Q. So when you came inside the store, did you say NYPD
4 officer?

5 A. No.

6 Q. You said you had your shield out. You never mentioned you
7 was an officer either?

8 A. No, I didn't.

9 Q. You also heard the code 32?

10 A. Yes.

11 Q. Which is larceny with no weapon involved?

12 A. Yes.

13 Q. Did you ever saw the Sprint call-out, did you ever see the
14 minutes of that code 32?

15 A. No.

16 Q. So you have no knowledge what it said?

17 A. I know it said wallet taken, I remember from the radio
18 transmission.

19 Q. Do you remember the description, my description that day?

20 A. No.

21 Q. So you have no knowledge what I was wearing, nothing?

22 A. No.

23 Q. What was your description?

24 A. I was probably wearing jeans or a pair of shorts and a
25 T-shirt.

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Jones - Direct

1 Q. So you're assuming that's what you was wearing?

2 A. I don't remember. It was six years ago.

3 Q. Did you have knowledge Officer Reid disarmed me?

4 A. I did know he had the gun or when he took it.

5 Q. You knew when he said he got the gun?

6 A. I didn't hear it.

7 Q. You was there close, though, so you didn't hear it?

8 A. I didn't hear it. It was a chaotic scene. I don't know if
9 he took the gun away from you after I had stepped up, after you
10 biting me. I didn't hear it.

11 Q. So you kept on striking me then, that's what you're saying?

12 A. Yes, because you didn't give up, and I couldn't tell if you
13 had given up the gun or not, because his arm was still stuck
14 underneath him. At that point you were still violently
15 struggling. You weren't handcuffed.

16 Q. So when Sergeant Reid retrieved the gun and he said, I got
17 the gun, I heard it. You didn't hear it?

18 THE COURT: I'm sorry, Mr. Munoz. Do you have a
19 question for this officer?

20 Q. You wasn't one of the officers that said, he got the gun?

21 A. No. No.

22 Q. Do you have knowledge which officer said that?

23 A. I told you I didn't hear it.

24 Q. So let's rewind. When I was towards my chest on the floor,
25 with both of my arms like this, right, to my chest, who was on

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Jones - Direct

1 top of me? Can you remember who was on top of me, what
2 position, where they were at?

3 A. I don't remember exactly which spot each officer was in. I
4 remember I was towards the right side of your body reaching
5 over your right shoulder. It's the only point I really
6 remember.

7 Q. So you was reaching over my shoulder as I was standing up
8 or on the ground?

9 A. No, you were never standing up when I engaged you. You
10 were on the ground.

11 Q. So you're reaching for my shoulder on the ground, but at
12 the same time striking blows at my ribs?

13 A. I was striking blows at his ribs, and then I was reaching
14 over trying to remove the firearm from his right hand. That's
15 when he bit me. Then I pulled my arm away. I stood up, got my
16 bearings, noticed I was bit, and then went back down, and then
17 tried to remove your arm from underneath you, trying to
18 handcuff you.

19 Q. So you're saying that I bit your arm before he got the gun?

20 A. I'm not sure. I believe you had the gun. I told you I
21 grabbed your right hand and it felt like he was gripping
22 something.

23 Q. You don't think that I bit you to give you a warning to
24 stop hitting me, because of the pain I was going through?

25 A. I don't know why you bit me.

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Jones - Cross

1 Q. When you was punching me in my ribs?

2 A. I don't know why you bit me.

3 Q. So didn't you hear me scream (loud sound), you didn't hear
4 that either?

5 A. I don't remember you screaming. You were just screaming.
6 "I'm not going back to jail" you were screaming. He was
7 kicking his legs. He was squirming.

8 Q. I am not going back to jail is different from screaming
9 like (loud sound). That's totally different.

10 MR. LICHTERMAN: Objection.

11 Q. It's totally different.

12 THE COURT: Yes, this is a time to ask this witness a
13 question, Mr. Munoz.

14 Q. You came in already when Sergeant Kelly and Sergeant Reid
15 and Sergeant Flynn were all on top of me, so you came in last.
16 So you didn't acknowledge me pulling out the gun?

17 A. No.

18 Q. And you didn't acknowledge of who cuffed me?

19 A. No. I'm not sure.

20 MR. MUNOZ: I have no further questions, your Honor.

21 THE COURT: Thank you.

22 Cross-examination.

23 CROSS-EXAMINATION

24 BY MR. LICHTERMAN:

25 Q. Detective Jones, did you use any force against plaintiff

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Jones - Cross

1 after he was in handcuffs?

2 A. No.

3 Q. Did you observe anyone use any force against plaintiff
4 after he was handcuffed?

5 A. No.

6 Q. You testified about your bite wound. Did you receive any
7 treatment for your bite wound?

8 A. Yes.

9 Q. What treatment did you receive?

10 A. They cleaned it up, bandaged it, and they gave me a tetanus
11 shot.

12 Q. Did your bite wound heal?

13 A. It did, over time. I am left with a small scar.

14 Q. How long did it take to heal?

15 A. Weeks, a couple of months to get where -- it was red for a
16 long time, and then it just turned into a scar.

17 MR. LICHTERMAN: Nothing further.

18 THE COURT: Any additional questions, Mr. Munoz, about
19 just what this officer just said this moment?

20 MR. MUNOZ: No, your Honor. I'm good.

21 THE COURT: You may step down.

22 (Witness excused)

23 THE COURT: So, ladies and gentlemen -- well, let me
24 first ask you, Mr. Munoz. Do you have any further evidence to
25 offer, Mr. Munoz?

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1 MR. MUNOZ: Your Honor, just photocopies that I
2 presented to you this morning.

3 THE COURT: They were received in evidence the first
4 thing when we began our trial again before the jury. They have
5 been received in evidence as Exhibits 1, 2, and 3.

6 So you may use those Exhibits 1, 2 and 3 in your
7 closing remarks to the jury since they are part of the evidence
8 in this trial.

9 MR. MUNOZ: I am going to need a photocopy of Officer
10 Jones' bite mark that's over there.

11 THE COURT: OK. That is Plaintiff's Exhibit 4 and it
12 has not been received in evidence.

13 MR. MUNOZ: Can at least the jurors see that? They
14 never got to see that photocopy.

15 THE COURT: Thank you for that question.

16 No. Because it's not part of the evidence in the case
17 because the witness could not and did not identify it.

18 But Exhibit 1, which is the photographs that you
19 offered, I believe from the hospital time, Exhibit 2 and 3 that
20 you offered are in evidence and are part of the evidentiary
21 record in this case.

22 MR. MUNOZ: But the jurors didn't get to see that
23 photo. I don't think that's fair.

24 THE COURT: OK. I have given you my ruling, Mr.
25 Munoz.

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1 Did you have any other evidence to offer?

2 MR. MUNOZ: As far as photocopies, no. Just the ones
3 from the hospital also --

4 THE COURT: Yes. They were received in evidence.

5 MR. MUNOZ: -- that the jurors haven't seen.

6 THE COURT: Well, you may show them to them. They
7 will be sent into the jury room during their deliberations, so
8 they will each be able to look at them with care at that time.
9 But, also, you may hold them up and display them during your
10 summation, if you would like to see them at that time.

11 MR. MUNOZ: OK, your Honor.

12 THE COURT: So the plaintiff rests.

13 Do the defendants have evidence to offer?

14 MS. DEPOIAN: No additional evidence.

15 THE COURT: So the defendants rest.

16 So, ladies and gentlemen, you have heard all the
17 evidence in this case.

18 We are going to take our mid-morning recess now. When
19 you come back, the parties will have an opportunity to make
20 their summation arguments to you, and then I will give you my
21 jury charge, and after that you may deliberate.

22 You may retire to the jury room.

23 (Jury exits courtroom)

24 THE COURT: Yes, Mr. Munoz.

25 MR. MUNOZ: After the day is over, can I get my

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1 photocopy back?

2 THE COURT: Absolutely. We can give it to you now.

3 MR. MUNOZ: Also, can I get the transcripts of
4 yesterday? And with your permission, will I be able to finish
5 my summation here?

6 THE COURT: The jury will take five to ten minutes, I
7 expect, for the morning break. Then it will be time for your
8 summation.

9 MR. MUNOZ: Can I like prepare myself?

10 THE COURT: Right now you may. You may. I don't
11 think anyone has ordered a transcript of the trial. So there
12 is no transcript available for anyone.

13 Did the defendants order the transcript?

14 MS. DEPOIAN: We thought we were ordered to get the
15 transcript by the Court.

16 THE COURT: I ordered you to get the transcript of the
17 final pretrial conference.

18 MS. DEPOIAN: In any event, we have the transcript.
19 We can provide Mr. Munoz with a copy as soon as we have access
20 to a photocopy machine.

21 THE COURT: So that would be after the trial, Mr.
22 Munoz. Right now we are going to move directly to the
23 summation in five to ten minutes, as soon as the jury is ready.

24 MR. MUNOZ: So I will be able to get all my
25 transcripts from this trial, after trial, or when will I be

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1 able to get them?

2 THE COURT: After the trial.

3 MR. MUNOZ: Can I use the rest room now and then come
4 back and do my summation?

5 THE COURT: Absolutely. We will all take a break.

6 MR. MUNOZ: Thank you, ma'am.

7 (Recess)

8 THE COURT: So I understand the defendants wanted to
9 address the Court.

10 MR. LICHTERMAN: Yes, your Honor.

11 At this time, defendants would like to move for
12 judgment as a matter of law pursuant to Rule 50 of the Federal
13 Rules of Civil Procedure on the following grounds.

14 First, the plaintiff has failed to establish the
15 personal involvement of any of the defendants. In order to do
16 so, he would have to put forth some sort of evidence to show
17 that they were actually personally involved in the alleged
18 force used after he was handcuffed.

19 Here, he really failed to attribute any specific
20 actions to the individual defendants with respect to force
21 after he was handcuffed. His testimony really was that he
22 didn't even recall what force was used after he was handcuffed
23 and what injuries resulted therefrom. No reasonable jury would
24 be able to find, therefore, that any of these defendants used
25 excessive force against him after he was handcuffed.

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1 Additionally, there is no credible evidence that was
2 offered that plaintiff suffered any injuries from this alleged
3 force. He failed to identify any injuries other than the two
4 lacerations and the ribs. He couldn't identify what the cause
5 of those injuries was. In fact, there was a significant amount
6 of testimony with respect to those injuries having happened
7 prior to plaintiff being handcuffed.

8 Additionally, there was no credible evidence in the
9 record that any jury could accept the plaintiff's version of
10 what happened as true. Plaintiff repeatedly controverted
11 himself while testifying on the stand on cross-examination, and
12 even testified that his memory of the entire incident, and
13 particularly with respect to the force used, was lacking due to
14 his various psychological issues, the fact that he was high on
15 crack, and specifically stated that there were many things that
16 he did not in fact recall.

17 However, to the extent that plaintiff has shown that
18 any force was used against him after he was handcuffed, he
19 hasn't met his burden to show that no reasonable officer, faced
20 with the same circumstances that the defendants were faced
21 with, would have done what these officers did. Therefore, the
22 defendants would also be entitled to qualified immunity.

23 THE COURT: I will reserve on that motion.

24 Earlier this morning we marked as a court exhibit and
25 handed out copies of the special verdict form.

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1 Any objections or requests?

2 MS. DEPOIAN: None, your Honor.

3 THE COURT: Mr. Munoz, I take it you have no
4 objections or requests to the special verdict form, is that
5 right?

6 MR. MUNOZ: Your Honor, pertaining to what you just
7 said?

8 THE COURT: No. We will give you another copy of the
9 form. You were given a copy earlier this morning. I don't
10 believe there is any ground for an objection. Obviously, I
11 created this document. But it's the form the jury will fill
12 out when they render their verdict.

13 MR. MUNOZ: I believe I have it.

14 THE COURT: Do you have a copy there?

15 MR. MUNOZ: I have to look for it.

16 THE COURT: We are giving you another copy. You don't
17 have to look for it. It's the one that has just been handed to
18 you by Ms. Rojas right in front of you now.

19 MR. MUNOZ: I have it.

20 THE COURT: OK. Good.

21 Ms. Rojas, he has found his original copy.

22 Thank you very much, Mr. Munoz.

23 It just asks the jury a series of questions to see
24 whether or not they have a verdict in your favor or not. OK?

25 MR. MUNOZ: What was that? Your Honor, I didn't hear

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1 you.

2 THE COURT: The form that you have in your hands is
3 the form the jury will fill out during their deliberations to
4 decide whether or not you have carried your burden to show a
5 violation of your rights. OK? I just want you to know what
6 that form is.

7 MR. MUNOZ: OK.

8 THE COURT: You don't have to do anything with it.
9 It's for the jury.

10 MR. MUNOZ: OK, ma'am.

11 THE COURT: Thank you.

12 Bring in the jury.

13 We are going to move the podium, Mr. Munoz, so that
14 you can use it like you did for your opening statement when
15 you're giving your summation. You can stand right by it. And
16 we will bring over a chair also.

17 Bring in the jury.

18 (Jury present)

19 THE COURT: Ladies and gentlemen, the evidentiary
20 portion of this trial is now concluded. You have received all
21 of the evidence. It was the testimony of the witnesses who
22 testified and the exhibits that were received in evidence.

23 Now is an opportunity for Mr. Munoz and for defense
24 counsel to address you. We call this their closing remarks or
25 their summation. Nothing they say at this point is evidence.

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Summation - Mr. Munoz

1 But I know you will give them close attention. It's their
2 opportunity to direct your attention to what they believe the
3 evidence has shown and to ask you to make whatever inferences
4 they believe is appropriate from that evidence.

5 We will begin with Mr. Munoz, who will address you.
6 Then defense counsel will have an opportunity to address you.
7 And, finally, we will give Mr. Munoz another brief chance to
8 address you, just to make sure there is nothing he didn't
9 forget to say when he first talked to you.

10 Mr. Munoz, you may approach the podium and address the
11 jury.

12 MR. MUNOZ: Hi, jurors, again.

13 This is my summation. I'm not really too
14 knowledgeable about this, but this is what I got.

15 I wrote that Sergeant Kelly doesn't know who cuffed
16 me, but during the struggle he was beating me. And Reid
17 doesn't know when he was punching me. Who else was punching
18 me?

19 Sergeant Reid was with Sergeant Kelly behind him, but
20 then he says he came in with Flynn and Jones. They say there
21 were soda glass bottles broken on the floor, when the sodas are
22 kept in plastic bottles in the back of the store in the
23 refrigerators.

24 I specifically mentioned that I had a drink, an
25 Arizona Pina Colada -- that's how I know -- on top of the

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Summation - Mr. Munoz

1 counter, just about to receive my sandwich.

2 Sergeant Kelly said he had both knees on my back, with
3 his weight I believe.

4 Reid said he disarmed me when I fell on the ground
5 with them, with me on top of the gun on my right hand. So that
6 couldn't have fractured -- that couldn't have fractured my left
7 rib if the gun was in my right hand when I fell.

8 And none of them can recall, when they were hitting
9 me, who cuffed me.

10 I hear "we," the word "we" cuffed him. How I have
11 four NYPD at the time, three officers and one sergeant at the
12 time, I was being cuffed two times, one to a machine and then
13 cuffed eventually to my both hands, and none know who cuffed me
14 with both hands.

15 Reid don't recall, he denies, I was never cuffed to a
16 machine. Flynn also. It seems like none of them want to
17 confess who finally cuffed me the second time to both hands.

18 Sergeant Kelly came in first with my right hand
19 holding the firearm shoulder length.

20 Flynn says I was pulling it out, but not sure where
21 from the waist.

22 It seems that they haven't -- not a similar story.

23 Flynn wasn't sure, doesn't remember who cuffed me. He
24 doesn't know how the laceration on my left eye, who caused it.
25 He doesn't see Reid recovering the firearm from me.

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Summation - Mr. Munoz

1 Flynn says he heard Reid, I retrieved the gun, I got
2 the gun.

3 All officers responded to a code 33, not a weapon
4 involved.

5 Flynn, Reid, Jones didn't say put the gun down. Here,
6 you have three NYPD officers and one sergeant at the time.
7 These are all trained officers, who one could have drawn his
8 gun and instruct me to put the gun down.

9 The wallet had more than \$195. I counted it myself.
10 .380 caliber bullet, that's what I believe Sergeant Flynn said.
11 He can't remember what ID, credentials, there were in the
12 wallet. He doesn't remember the bills in the wallet. So how
13 could there be a lucky two bill in the wallet when I counted
14 it?

15 All in reality, I know I committed a crime. And when
16 I was in possession of the wallet, I ran inside a building to
17 throw away Mr. Catalina LaCourt, my friend, who I robbed, all
18 his credentials, all his IDs, all of his American Express
19 credit cards. I counted all the money. It was 20s, 50s, 100s,
20 and the two singles -- or the one single that he was going to
21 give me when I snatched the wallet out of his hand. The wallet
22 was brown.

23 THE COURT: Mr. Munoz, this isn't the chance to
24 testify.

25 MR. MUNOZ: They were 20s, 50s, 100s, no singles. He

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Summation - Mr. Munoz

1 had almost \$900.

2 MR. LICHTERMAN: Objection, your Honor.

3 MR. MUNOZ: I counted them inside the building.

4 THE COURT: Mr. Munoz, can I interrupt a moment?

5 MR. MUNOZ: This is my first time doing a summation.

6 THE COURT: I know. I am just going to interrupt you
7 a moment here.

8 The time to testify and tell the jury what you
9 remembered was the time when you were under oath and at the
10 witness stand.

11 MR. MUNOZ: OK.

12 THE COURT: You can't add facts now.

13 MR. MUNOZ: OK.

14 THE COURT: What you can do --

15 MR. MUNOZ: Afterwards?

16 THE COURT: No. You remind the jury of what you
17 believe were the important parts of the testimony and the
18 evidence that was received at trial.

19 MR. MUNOZ: So everything is good just about the
20 wallet part, right? Everything so far so good?

21 THE COURT: Yes.

22 MR. MUNOZ: I apologize.

23 THE COURT: No problem.

24 MR. MUNOZ: I apologize to the jurors, because I don't
25 really have the knowledge like that, like everybody else in

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Summation - Ms. Depoian

1 here.

2 Jones don't remember also who cuffed me in this
3 excessive force. He was punching right side, but not sure the
4 left side of my ribs. He is not sure who cuffed me also. He
5 didn't never mention he was an officer. He heard the code 32.

6 Sergeant Reid, he's not sure if -- he didn't hear him
7 say, I retrieved the gun, I got the gun.

8 After the gun was removed, it seems it's hard to
9 believe where I bit him was at the wrist, when he says he was
10 striking hard blows towards my rib. However, I do admit I bit
11 him.

12 I feel like all three sergeants now and one officer
13 can't recall which officer cuffed me. It looks like none of
14 these sergeants and officer want to take the blame for this
15 excessive force, of which officer cuffed me, that was taken
16 after being cuffed two times.

17 Jurors, I am asking for all of you to give me a fair
18 response to these facts that I have for you and that you all
19 heard.

20 Thank you.

21 MS. DEPOIAN: Good morning, ladies and gentlemen.

22 Ladies and gentlemen, plaintiff wants you to believe
23 that he was victimized by these four defendants on September
24 13, 2011. He wants you to feel sympathy for him. Don't fall
25 for it. Plaintiff is not a victim. Plaintiff was not a victim

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Summation - Ms. Depoian

1 at any time on September 13, 2011. He was not the victim when
2 he robbed an 86-year-old man with a gun while he was high. He
3 was not the victim when he pulled out a loaded gun out of his
4 pocket, when he saw four police officers enter a bodega on
5 September 13, 2011. Plaintiff was not the victim when he
6 caused all four of these police officers to be terrified for
7 their lives, as he struggled with them for a gun, that could
8 have gone off and killed any one of them at any moment. And
9 plaintiff was not a victim when he bit Detective Jones on the
10 wrist breaking his skin and causing him to bleed.

11 Now, ladies and gentlemen, this is the verdict sheet
12 in this case. This is the sheet you will have with you when
13 you are in the jury room. Are you able to see it in front of
14 you now? It has a few questions on it. But this one, the
15 first one, is the one that matters.

16 This question says: "Did the plaintiff establish by a
17 preponderance of the evidence that his rights under Section
18 1983 were violated by?" And it says, A, B, C and D, each of
19 the defendants.

20 The answer to that question for each of the defendants
21 is no.

22 Now, the judge is going to tell you that plaintiff
23 must prove that his rights were violated by the use of
24 excessive force after he was already in handcuffs.

25 The reason we know that they did not do this is

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Summation - Ms. Depoian

1 because, first of all, the officers all told you it didn't
2 happen.

3 We also know this didn't happen because plaintiff
4 never mentioned that any force was used after his handcuffing
5 when he spoke to investigators right after his arrest. He was
6 told that day that he was being questioned to determine how he
7 received his injuries. He was told that he was being
8 questioned to find out whether there was any police misconduct.

9 Plaintiff has testified at length about how he was
10 beat up before he let go of the gun. But when plaintiff talked
11 to the investigators, he doesn't even mention that anything
12 happened to him after he was cuffed. He just says he was
13 cuffed and then taken outside, which is, as we know, what
14 actually happened.

15 Plaintiff never complained about any force being used
16 after his handcuffing until long after his arrest on September
17 13, 2011, until he brought this very lawsuit.

18 The next reason the first answer to the question on
19 the verdict sheet is no is because plaintiff was high on crack
20 on September 13, 2011. You have heard many times throughout
21 this trial he had been smoking crack for three straight days
22 when this happened.

23 We don't remind you of this fact to belittle plaintiff
24 in any way. But plaintiff's use of this substance affected his
25 memory that day. And this means that plaintiff can't meet his

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Summation - Ms. Depoian

1 burden to prove his case by a preponderance of the evidence,
2 and the judge will tell you more about what that means when I
3 am done.

4 So let's talk about plaintiff's memory from that day.
5 He doesn't remember robbing Mr. LaCourt. He doesn't remember
6 how he got to the bodega. His memory of the whole day is all
7 over the place. You heard how many of the questions about that
8 day he couldn't answer. He doesn't remember being treated by
9 EMS at the scene, or riding in the ambulance to the hospital.
10 He doesn't remember who punched him when.

11 Now look at what plaintiff wants you to believe that
12 he does remember.

13 Plaintiff would have you believe that he pulled out
14 the gun because he was attempting to acknowledge that he
15 committed a crime. But plaintiff testified he never actually
16 threw the gun on the ground. Instead, plaintiff yelled at the
17 officers, This ain't for you, you're going to have to kill me,
18 I'm not going back to jail. If someone was trying to show the
19 officers a gun to acknowledge that they committed a crime, they
20 would not say those things; they wouldn't keep holding on to a
21 gun while the police officers struggled to get it from them.

22 Once again, plaintiff wants you to believe that he is
23 a victim here. He wants you to think that this was not his
24 fault, because when he pulled out the gun, it was pointed down
25 and his finger was not on the trigger, as he said, and the

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Summation - Ms. Depoian

1 officers didn't yell, drop the gun -- by the way, they didn't
2 have time to say that -- that plaintiff wasn't the one in the
3 wrong here. Don't fall for it. Plaintiff pulled out a gun on
4 police officers, who he knew were police officers, and the
5 officers did what they needed to do to get that gun from him
6 safely.

7 Now, just to be clear, this case is not about what
8 happened before plaintiff finally let go of the gun and placed
9 in handcuffs. The only thing you will need to decide is
10 whether you believe the officers used force on plaintiff after
11 he was already in handcuffs.

12 I am bringing up what happened before plaintiff was
13 handcuffed for two reasons.

14 First, because what plaintiff says happened before he
15 was placed in handcuffs utterly lacks believability.

16 Second, what happened before he was placed in
17 handcuffs explains all of his injuries.

18 Which brings me to the next reason we know that no
19 force was used on plaintiff after he was handcuffed. Plaintiff
20 doesn't have any injuries from any force other than what was
21 used before he was in handcuffs and before he let go of the
22 gun. Let's quickly go through each of plaintiff's injuries
23 from September 13 one at a time.

24 First, plaintiff had that laceration to his eye. He
25 testified on cross-examination the cut above his eye happened

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Summation - Ms. Depoian

1 before he let go of the gun. He told you it was from the first
2 hit. So this cut could not possibly have happened after
3 plaintiff was placed in handcuffs.

4 Now, there is plaintiff's fractured rib. We know the
5 plaintiff was taken to the ground, and when he landed his gun
6 was underneath him. Sergeant Flynn and Sergeant Kelly both
7 landed at least partially on top of plaintiff, and you can see
8 those are two big guys. That fall alone certainly could have
9 broken his rib. Officer Jones even testified that he punched
10 plaintiff in the rib to get the gun from him. So it's just
11 common sense that the fracture to plaintiff's ribs was caused
12 before he was placed in handcuffs, while he was still refusing
13 to let go of the gun.

14 Next, you saw the plaintiff had a cut on his arm.
15 Plaintiff has no idea how his arm was cut, but again, common
16 sense tells you this probably happened somewhere in the
17 struggle for the gun. He was taken to the ground. There were
18 things falling all over the place in the bodega. And it also
19 defies common sense as to how any officer could have cut
20 plaintiff's inner forearm after his arm was already behind him
21 in handcuffs. From a punch? So that injury didn't occur after
22 he was handcuffed either.

23 So now let's talk about what injuries plaintiff did
24 not have. He had no broken bones in his face. Other than his
25 left eye, he had no bruising on his face. He had no bruising

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Summation - Ms. Depoian

1 on his body. If these officers had continued to use force on
2 plaintiff after he his hands were cuffed behind his back, the
3 photographs that you saw during this trial would show these
4 injuries.

5 So why is plaintiff making up this story now?

6 Well, plaintiff was sentenced to ten years in jail for
7 the crime of armed robbery after he was caught with this gun.
8 That's exactly what plaintiff did not want to happen. He even
9 told the officers that that day. He didn't want to go back to
10 jail. He's angry he got caught and he has to find some way to
11 blame someone else instead of taking responsibility for his own
12 actions.

13 So to plaintiff, the truth, which is that plaintiff
14 was injured after he pulled a gun out on these officers, now
15 becomes a story where plaintiff is the victim in the use of
16 excessive force by police officers.

17 Now, ladies and gentlemen, this is a sad case you have
18 been listening to for the last few days. The effects of drug
19 addiction and mental illness are not easy to hear. But the
20 reality is that the defendants encountered an intoxicated and
21 mentally ill man, inside of a bodega, on September 13, 2011.
22 And while it is true, as I mentioned, you are not here to
23 decide whether the officers' actions were appropriate before
24 plaintiff was in handcuffs, you should think about the fact
25 that the officers had split seconds to decide what to do when

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Rebuttal - Mr. Munoz

1 they saw plaintiff. You saw Officer Flynn, just maybe an hour
2 ago, show you how quickly it takes to pull a gun from here to
3 here. They did what they had to do. And think about how
4 quickly someone could just pull a trigger. Microseconds.

5 The defendants were simply relieved to be alive after
6 plaintiff was in handcuffs, and none of them punched plaintiff
7 after everybody was safe. Don't let the plaintiff play the
8 victim in this incident. He is not the victim.

9 Soon the judge will read you some instructions and
10 then you will begin your deliberations. When you do, when
11 you're back in the jury room looking at this verdict sheet, you
12 will be asked to answer the question of whether plaintiff
13 established by a preponderance of the evidence that his rights
14 were violated under Section 1983 by any of these four
15 defendants. The answer to that question with respect to all
16 four officers is no.

17 Thank you.

18 THE COURT: Now, Mr. Munoz, you have another
19 opportunity, if you would like, to briefly make remarks to the
20 jury. Do you want to speak with them again or not?

21 MR. MUNOZ: Yeah. About what she just read, your
22 Honor?

23 THE COURT: Yes. If you would like to respond to that
24 briefly, feel free. Just come up to the podium here and speak
25 to the jury again about what you think the evidence showed.

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Rebuttal - Mr. Munoz

1 MR. MUNOZ: Yes, ma'am.

2 Well, as you could see, I am representing myself. I
3 know my name is Nehmias Munoz.

4 At that time, yes, I was intoxicated, I was high on
5 crack for three days, but I do remember of me pulling out the
6 firearm out of my left pocket.

7 MS. DEPOIAN: Objection, your Honor.

8 THE COURT: I think you're reminding the jury of what
9 you admitted on the stand. Am I right?

10 MR. MUNOZ: Yes.

11 THE COURT: You may continue to describe the evidence
12 you gave.

13 MR. MUNOZ: I never pointed the firearm towards any of
14 the officers. That's why I believe I am still alive today. I
15 believe if I would have had that finger on the trigger, which I
16 didn't, and I would have pointed like the officer showed the
17 jurors how quickly somebody could shoot somebody, I think I
18 wouldn't have been here today.

19 As I explained, and I try to defend myself, we don't
20 have the officer who actually cuffed me with both hands when
21 excessive force kept on.

22 I think I did the best I can representing myself,
23 defending myself, and I hope this will be credible for me.

24 That's about it. I really thank each of you for
25 listening to me.

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Charge

1 THE COURT: So, ladies and gentlemen, we are now at
2 the point of the trial where I am going to give you my charges
3 to the law.

4 So, Ms. Rojas, would you please give the members of
5 the jury each a copy of the jury charge?

6 THE DEPUTY CLERK: Yes, your Honor.

7 THE COURT: Ms. Rojas, could you kindly announce the
8 charge?

9 Mr. Munoz, this is a second copy for you. I know you
10 had a prior copy. We are just giving you a fresh copy.

11 THE DEPUTY CLERK: The Court is about to charge the
12 jurors. Any spectator wishing to leave will do so now or
13 remain seated until the completion of the Court's charge.

14 THE COURT: So, ladies and gentlemen, you have each
15 been given a copy of the jury charge. I am going to read this
16 to you now.

17 You must listen carefully to me as I read this. Some
18 people find it easier to understand what is being read to them
19 if they can read along. If you would like to do so, you may
20 read along. If you prefer to just listen to me, just put that
21 document under your chair and just listen to me.

22 I will now instruct you as to the law. It is your
23 duty to accept these instructions of law and apply them to the
24 facts as you determine them. If anyone has stated a legal
25 principle different than any that I state to you in my

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Charge

1 instructions, it is my instructions that you must follow.

2 You should not single out any instruction as alone
3 stating the law, but you should consider my instructions as a
4 whole when you retire to deliberate.

5 (Continued on next page)

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Charge

1 THE COURT: Your role is to decide the fact issues
2 that are in the case. You are the sole and exclusive judges of
3 the facts. You must determine the facts based solely on the
4 evidence received in this trial. You must weigh and consider
5 the evidence without regard to sympathy, prejudice, or passion,
6 for or against any party.

7 I remind you that nothing I have said during the trial
8 or will say in these instructions is evidence. Similarly, the
9 rulings I've made during the trial are not any indication of my
10 views of what your decision should be. What has been said in
11 the opening statements, closing arguments, objections, and
12 questions is not evidence.

13 The evidence before you consists of the answers given
14 by the witnesses and the exhibits that were received in
15 evidence. You may not consider any testimony that I told you
16 to disregard or that was stricken from the record.

17 The plaintiff in this case is Nehmias Munoz. As I
18 explained to you at the beginning of the trial, Mr. Munoz is
19 appearing pro se. This means that he is exercising his right
20 to represent himself and to proceed without the assistance of
21 an attorney. The fact that Mr. Munoz is proceeding pro se does
22 not mean that his claims should be given any greater or lesser
23 consideration by you. All litigants are equal under the law.

24 You should treat the testimony Mr. Munoz gave while on
25 the stand as you do the testimony of all the other witnesses.

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Charge

1 At all other times Mr. Munoz was functioning as an attorney.
2 His statements at the opening and close of the trial, as well
3 as his questions and objections, are not evidence in this case,
4 just as the statements of the defendant's attorneys are not
5 evidence.

6 Also, the fact that Mr. Munoz is currently
7 incarcerated does not mean that his claims in this lawsuit are
8 entitled to any greater or lesser consideration by you. Again,
9 all litigants are equal under the law.

10 The four individual defendants in this case are
11 employed by the New York City Police Department. Their
12 employment in the NYPD does not mean that they are entitled to
13 any greater or lesser consideration, again, by you. Again,
14 once more, all litigants are equal before the law.

15 In reaching your verdict, you must bear in mind that
16 each of the defendants is to be considered separately. Your
17 verdict must be reached solely on the evidence or lack of
18 evidence presented against each defendant without regard to the
19 liability of the other defendants.

20 The burden of proof in this case rests on Mr. Munoz.
21 The standard under which you will decide whether Mr. Munoz has
22 met his burden of proof is the preponderance of the evidence.
23 To establish by a preponderance of the evidence means that the
24 evidence of the party having the burden of proof must be more
25 convincing and persuasive to you than the evidence opposed to

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Charge

1 it. The difference in persuasiveness need not be great. It
2 requires only that you find that the scales tip, however
3 slightly, in favor of the party with the burden of proof, that
4 what that party claims is more likely true than not.

5 What is important is the quality of the evidence and
6 not the number of witnesses or the number or variety of
7 exhibits, or the length of the time spent on a subject. In
8 determining whether any fact has been proven by a preponderance
9 of the evidence, you may consider the testimony of all the
10 witnesses and all the exhibits.

11 Simply because I've permitted certain evidence to be
12 introduced does not mean that I've decided on its importance or
13 significance. That is for you to decide.

14 Mr. Munoz claims that on September 13, 2011, Officer
15 Reid, Officer Jones, Sergeant Flynn, and Sergeant Kelly
16 deprived him of his rights under the United States Constitution
17 by using excessive force against him after he was handcuffed
18 and/or failing to intervene in the use of excessive force
19 against him by another person after he was handcuffed.
20 Defendants deny this claim.

21 Mr. Munoz's claim against the defendants arises under
22 Section 1983, the federal civil rights law. Section 1983 makes
23 it illegal for a person acting under color of state law to
24 deprive someone of his rights guaranteed by the Constitution or
25 laws of the United States. Section 1983 provides -- and here I

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Charge

1 am quoting:

2 "Every person who, under color of any statute,
3 ordinance, regulation, custom, or usage, of any State...
4 subjects, or causes to be subjected, any citizen of the United
5 States... to the deprivation of any rights, privileges, or
6 immunities secured by the Constitution and laws, shall be
7 liable to the party injured."

8 Here, the rights at stake are those secured by the
9 Fourth Amendment to the United States Constitution, which
10 forbids an "unreasonable" seizure, including the use of
11 excessive force.

12 To establish a Section 1983 claim, a plaintiff must
13 establish, by a preponderance of the evidence, each of the
14 following three elements against the defendant you are
15 considering:

16 First, that the defendant was acting under the color
17 of state law at the time of the incident on September 13, 2011.
18 That is not contested.

19 Second, that the defendant's conduct deprived the
20 plaintiff of a right secured by the Constitution of the United
21 States -- that is, the right to be free from the use of
22 excessive force.

23 Third, that the defendant's acts were the proximate
24 cause of damages sustained by the plaintiff.

25 To establish that the defendant you are considering

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Charge

1 engaged in the excessive use of force against him, Mr. Munoz
2 must prove by a preponderance of the evidence each of the
3 following:

4 That the defendant used force against him on
5 September 13, 2011, after he was placed in handcuffs;

6 That at that time the defendant used some amount of
7 force intentionally or recklessly; and

8 That the defendant used a level of force that was
9 objectively unreasonable.

10 The defendant's use of some force must have been
11 intentional or reckless. An act is intentional if it is done
12 knowingly -- that is, if it is done voluntarily and
13 deliberately and not because of mistake, accident, negligence,
14 or other innocent reason. An act is reckless if it is done
15 with conscious disregard for its known probable consequences.
16 To be clear, Mr. Munoz is required to prove only that the
17 defendant used some amount of force intentionally. He is not
18 required to show that the defendant intended to violate his
19 constitutional rights or intended to use excessive force. In
20 deciding whether a person acted intentionally or recklessly,
21 you should remember that there is no way of looking into a
22 person's mind. You must depend on what was done and what the
23 people involved said was in their mind and your belief or
24 disbelief of those facts.

25 To show that the level of force was excessive,

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Charge

1 Mr. Munoz must show that any force used after he was placed in
2 handcuffs was objectively unreasonable in light of the facts
3 and circumstances confronting the defendant at that time,
4 without regard to the defendant's underlying intention or
5 motivation. In other words, you must determine whether the
6 amount of force was that which a reasonable law enforcement
7 officer would have employed under similar circumstances. You
8 should not make this determination, however, by considering how
9 the facts appear when assessed with 20/20 hindsight. You may
10 make allowance for the fact that officers are often forced to
11 make split-second judgments about the amount of force that is
12 necessary in circumstances that are tense, uncertain, or
13 rapidly evolving. You may consider, for instance, the severity
14 of the crime for which Mr. Munoz was being arrested, whether
15 Mr. Munoz posed an immediate threat to anyone, or whether
16 Mr. Munoz was actively resisting or attempting to resist
17 arrest. When a person whom an officer attempts to detain
18 resists, any force used by the officer must be reasonably
19 related to the nature of the resistance and the force used,
20 threatened, or reasonably perceived to be threatened against
21 the officer.

22 In addition, if a law enforcement officer witnesses
23 another officer using excessive force and has a realistic
24 opportunity to stop its use, the law requires him to intervene.
25 In deciding whether an officer had a realistic opportunity to

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Charge

1 intervene, you should consider all of the circumstances,
2 including whether he had sufficient time to intervene and was
3 capable of preventing the use of excessive force. All law
4 enforcement officials have an affirmative duty to intervene to
5 protect the constitutional rights of citizens from infringement
6 by other law enforcement officials in their presence. A
7 defendant who fails to intervene in the use of excessive force
8 is liable for the preventable harm caused by the actions of
9 others.

10 The third element that the plaintiff must prove is
11 that the defendant's use of excessive force proximately caused
12 any injuries that the plaintiff has proven he sustained after
13 he was placed in handcuffs. Proximate cause means that there
14 must be sufficient causal connection between the act of the
15 defendant and any injury or damage sustained by a plaintiff.
16 An act or omission is a proximate cause if it is a substantial
17 factor in bringing about or actually causing injury -- that is,
18 if the injury or damage was a reasonably foreseeable
19 consequence of the defendant's act. A proximate cause need not
20 always be the nearest cause in time or space. In addition,
21 there may be more than one proximate cause of an injury or
22 damage. Many factors or the conduct of two or more people may
23 operate at the same time, either independently or together, to
24 cause an injury.

25 If you find that the plaintiff was physically injured

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Charge

1 but that those injuries were caused by the actions that a law
2 enforcement officer or officers (1) took before or at the
3 moment the plaintiff was placed in handcuffs or (2) took after
4 he was placed in handcuffs but did not constitute a use of
5 excessive force, then the plaintiff has not shown that his
6 injuries were caused by the use of excessive force after he was
7 handcuffed. If, however, the plaintiff proved by a
8 preponderance of the evidence that he suffered an injury after
9 he was placed in handcuffs and that a defendant's use of
10 excessive force at that time proximately caused that injury,
11 then he has carried his burden on this element of his claim.

12 You should not infer that Mr. Munoz is entitled to
13 recover damages for his claim merely because I'm instructing
14 you on the elements of damages. It is exclusively your
15 function to decide upon liability, and I'm instructing you on
16 damages only so you will have guidance should you decide that
17 Mr. Munoz is entitled to recovery.

18 If you find a violation of Mr. Munoz's rights, then
19 Mr. Munoz is entitled to collect damages for the injuries he
20 has proven by a preponderance of the evidence were caused by
21 that violation. The damages must be fair and reasonable,
22 neither inadequate nor excessive. You should not award damages
23 for speculative injuries but only for those injuries that the
24 plaintiff has actually suffered because of the violation. It
25 is the plaintiff's burden to prove the amount of damages and to

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1 prove that the damages were caused by one or more of the
2 defendants' intentional or reckless use of excessive force or
3 failure to intervene to stop another from using excessive
4 force.

5 Mr. Munoz also may be awarded damages for conscious
6 pain and suffering. Pain and suffering means any mental
7 suffering, including emotional suffering, or any resulting
8 physical ailment caused by the wrongful acts of the defendants.
9 Conscious pain and suffering means pain and suffering of which
10 there was some level of awareness by Mr. Munoz. In determining
11 the amount, if any, to award Mr. Munoz for pain and suffering,
12 you may take into consideration the effect that these injuries
13 may have had on his ability to enjoy life. In order to recover
14 damages for mental and emotional stress, Mr. Munoz must present
15 credible evidence with respect to the claimed distress.
16 Psychiatric or other medical treatment is not a precondition to
17 recovery, nor is Mr. Munoz required to prove his claim through
18 expert medical testimony. There is no requirement that
19 evidence of the monetary value of such intangible items as
20 mental anguish be introduced into evidence.

21 The purpose of a damage award is to compensate
22 Mr. Munoz for the actual harm he suffered, if any, as a direct
23 result of excessive force. The purpose of such an award of
24 compensatory damages is not to punish defendants.

25 There is no exact standard for fixing the compensation

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1 to be awarded for these damages. Any award should be fair in
2 light of the evidence presented at trial.

3 If you find after considering all the evidence
4 presented that any of the defendants violated the plaintiff's
5 constitutional rights under Section 1983 but that the plaintiff
6 suffered no actual injury as a result of this violation, you
7 must award the plaintiff nominal damages. Nominal damages are
8 awarded in recognition that the plaintiff's rights have been
9 violated. You should award nominal damages of 1 dollar if you
10 concluded that the only injury that the plaintiff suffered was
11 a deprivation of his rights, without any actual damages.

12 You may also award nominal damages of 1 dollar if,
13 upon finding that some injury resulted from the deprivation of
14 the plaintiff's rights, you find that you are unable to compute
15 monetary damages except by engaging in pure speculation and
16 guessing. You may not award both nominal and actual damages to
17 the plaintiff for a violation of Section 1983. Either he
18 experienced actual damages, in which case you must award
19 compensatory damages, or else he did not, in which case you
20 must award nominal damages. Nominal damages may not be awarded
21 for more than a token sum.

22 If you return a verdict against any of the defendants,
23 then you should decide whether to award Mr. Munoz punitive
24 damages against that defendant. At this point you are only to
25 determine whether an award of punitive damages is appropriate.

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1 You should not determine the amount of such award.

2 If you decide that the plaintiff is entitled to
3 punitive damages, then there may be some brief additional
4 evidence presented to you to assist you in determining the
5 amount of punitive damages.

6 You may award punitive damages if you believe that the
7 defendant should be punished for conduct that was motivated by
8 an evil motive or intent or that involved callous disregard or
9 reckless indifference to Mr. Munoz's rights.

10 Mr. Munoz is not entitled to punitive damages as a
11 matter of right. You must make a judgment about an individual
12 defendant's conduct. To make such a judgment, it's important
13 to keep in mind the reasons for awarding punitive damages: to
14 punish an individual defendant for malicious conduct against
15 the plaintiff or callous disregard or reckless indifference for
16 a plaintiff's rights and to deter such conduct of a defendant
17 or others like the defendant. Thus, you should consider
18 whether the award of punitive damages will accomplish this dual
19 purpose of punishment and deterrence.

20 Now there are two types of evidence that you may
21 properly use in reaching your verdict. One type of evidence is
22 direct evidence. One kind of direct evidence is the witness'
23 testimony about something he knows by virtue of his own
24 senses -- something the witness has seen, felt, touched, or
25 heard. Direct evidence may also be in the form of an exhibit.

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1 The other type of evidence is circumstantial evidence.
2 Circumstantial evidence is evidence that tends to prove one
3 fact by proof of other facts. There is a simple example of
4 circumstantial evidence that is often used in this courthouse.

5 Assume that when you came into the courthouse this
6 morning, the sun was shining and it was a nice day. Assume
7 that the courtroom blinds are drawn and you cannot look
8 outside. As you are sitting here, someone walks in with an
9 umbrella that is dripping wet. Somebody else then walks in
10 with a raincoat that is also dripping wet.

11 Now you can't look outside under this hypothetical and
12 you cannot see whether or not it is raining. So you have no
13 direct evidence of that fact. But on the combination of the
14 facts that I've asked you to assume, it would be reasonable and
15 logical for you to conclude that between the time you arrived
16 at the courthouse and the time these people walked in, it had
17 started to rain.

18 That's all there is to circumstantial evidence. You
19 infer on the basis of reason and experience and common sense
20 from an established fact the existence or nonexistence of some
21 other fact.

22 Many facts, such as a person's state of mind, can only
23 rarely be proven by direct evidence. Circumstantial evidence
24 is of no less value than direct evidence. The law makes no
25 distinction between direct and circumstantial evidence but

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1 simply requires that you, the jury, decide the facts in
2 accordance with the preponderance of all the evidence, both
3 direct and circumstantial.

4 Now for the important subject of evaluating testimony.
5 How do you evaluate the credibility or believability of the
6 witnesses? The answer is, you use your plain common sense.
7 Common sense is your greatest asset as a juror. You should ask
8 yourselves, did the witness appear to you to be honest, open,
9 and candid? Or did the witness appear evasive or as though the
10 witness were trying to hide something? How responsive was the
11 witness to the questions asked on direct examination and on
12 cross-examination?

13 If you find that a witness is intentionally telling a
14 falsehood, that is always a matter of importance that you
15 should weigh carefully. If you find that any witness has lied
16 under oath at this trial, you should view the testimony of that
17 witness cautiously and weigh it with great care. It is,
18 however, for you to decide how much of the witness' testimony,
19 if any, you wish to believe. Few people recall every detail of
20 every event precisely the same way. A witness may be
21 inaccurate, contradictory, or even untruthful in some respects
22 and yet entirely believable and truthful in other respects. It
23 is for you to determine whether such inconsistencies are
24 significant or inconsequential and whether to accept or reject
25 all or to accept some and reject the balance of the testimony

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1 of any witness.

2 In evaluating the credibility of the witnesses, you
3 should take into account any evidence that a witness may
4 benefit or suffer in some way from the outcome of this case.
5 Such interest in the outcome creates a motive to testify
6 falsely and may sway a witness to testify in a way that
7 advances his own interests. Therefore, if you find that any
8 witness' testimony you are considering has an interest in the
9 outcome of the trial, then you should bear that factor in mind
10 when evaluating the credibility of his testimony and accept it
11 with great care.

12 On some occasions during this trial witnesses were
13 asked to explain an apparent inconsistency between testimony
14 offered at this trial and previous statements made by the
15 witness. It is for you to determine whether a prior statement
16 was inconsistent and, if so, how much, if any, weight to give
17 to an inconsistent statement in assessing the witness'
18 credibility at trial.

19 There is no magic formula by which you can evaluate
20 testimony. You bring to this courtroom all your experience.
21 You determine for yourselves in many circumstances the
22 reliability of statements that are made by others to you and
23 upon which you are asked to rely and act. You may use this
24 same test here that you use in your everyday lives. Among the
25 factors you may consider are the witness' intelligence; the

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1 ability and opportunity the witness had to see, hear, or know
2 about the things that the witness testified about; the witness'
3 memory; any interest, bias, or prejudice the witness may have;
4 the manner of this witness while testifying; and the
5 reasonableness of the witness' testimony in light of all the
6 evidence in the case.

7 You have heard testimony of law enforcement officers.
8 The fact that a witness is employed by the police department of
9 the city of New York does not mean that his testimony is
10 necessarily deserving of more or less consideration or greater
11 or lesser weight than that of any other witness. It is your
12 decision, after reviewing all the evidence, whether to accept
13 or reject the testimony of the witness and give to that
14 testimony whatever weight you find it deserves.

15 You've heard evidence that the plaintiff was
16 previously convicted of a crime. You may consider evidence of
17 a prior conviction only for what light you find it sheds, if
18 any, on his credibility.

19 Your verdict will be organized according to a special
20 verdict form. This form will assist you in reaching a verdict.
21 It lists the questions you must resolve based on the
22 instructions that I've given you. When the foreperson has
23 completed the form, each of you must sign your name, and the
24 form will be marked as a Court exhibit.

25 Your verdict must be based solely upon the evidence,

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1 or the lack of evidence, developed at trial and the
2 instructions I've given you on the law. It would be improper
3 for you to consider, in reaching your decision, any personal
4 feelings you may have about a party's race, ethnicity, national
5 origin, disability, or the plaintiff's status as a prisoner.

6 Your verdict must be based solely on the evidence
7 admitted at trial. I've told you this many times. And for
8 that reason, you may not discuss this case with anyone except
9 the jurors with whom you are deliberating when all of you are
10 gathered together in the jury room. You may not do any
11 independent research about any of the people, facts, or issues
12 in this case, using the internet or any other research tool.

13 Do not communicate with each other by telephone or
14 computer during your deliberations. Moreover, you should not
15 give anyone any information about your jury service on any
16 social networking website. You should not update your status
17 on any website to tell anyone that you are a juror on a trial
18 or to give any information about the trial at all during your
19 deliberations.

20 The most important part of this case, members of the
21 jury, is the part that you as jurors are now about to play as
22 you deliberate on the issues of fact. I know you will try the
23 issues that have been presented to you according to the oath
24 that you have taken as jurors. In that oath you promised that
25 you would well and truly try the issues joined in this case and

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1 a true verdict render.

2 As you deliberate, please listen to the opinions of
3 your fellow jurors and ask for an opportunity to express your
4 own views. Every juror should be heard. No one juror should
5 hold the center stage in the jury room and no one juror should
6 control or monopolize the deliberations. If after listening to
7 your fellow jurors and if after stating your own view you
8 become convinced that your view is wrong, do not hesitate
9 because of stubbornness or pride to change your view. On the
10 other hand, do not surrender your honest convictions or beliefs
11 solely because of the opinions of your fellow jurors or because
12 you are outnumbered. Your final vote must reflect your
13 conscientious belief as to how the issues should be decided.

14 Your decision must be unanimous. You are not to
15 reveal the standing of the jurors -- that is, the split of the
16 vote -- to anyone, including the Court, at any time during your
17 deliberations.

18 Finally, I say this not because I think it is
19 necessary but because it is a custom in this courthouse to say
20 this: You should treat each other with courtesy and respect
21 during your deliberations.

22 During your deliberations you will have some of the
23 exhibits available to you in the jury room. You may also ask
24 for portions of the testimony, but please try to be as specific
25 as you can in requesting testimony.

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1 If you have questions for the Court, just send me a
2 note. As I said, you have a copy of this set of instructions
3 to take with you into the jury room. Each of you may take the
4 copy you're holding in your hand.

5 Your first task will be to select a foreperson. The
6 foreperson has no greater voice or authority than any other
7 juror but is the person who will communicate with the Court
8 when questions arise.

9 All litigants stand equal in this room. All litigants
10 stand equal before the bar of justice. All litigants stand
11 equal before you. Your duty is to decide between these parties
12 fairly and impartially to see that justice is done. On your
13 oath as jurors, you are not to be swayed by sympathy. You
14 should be guided solely by the evidence presented in the trial
15 and the law as I gave it to you, without regard to the
16 consequences of your decision. You have been chosen to try the
17 issues of fact and reach a verdict on the basis of the evidence
18 or lack of evidence. If you let sympathy interfere with your
19 clear thinking, there is a risk that you will not arrive at a
20 just verdict. All parties to a civil lawsuit are entitled to a
21 fair trial. You must make a fair and impartial decision so
22 that you will arrive at a just verdict.

23 I'm going to ask you to remain patiently in the jury
24 box without speaking to each other for one more moment while I
25 speak to the plaintiff and defense counsel at the sidebar.

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(At the sidebar)

THE COURT: So do the defendants have any objections to the jury charge as given?

MS. DEPOIAN: No, your Honor.

MR. LICHTERMAN: No.

THE COURT: Mr. Munoz, do you have any objection to the jury charge as given?

MR. MUNOZ: No, your Honor.

THE COURT: You may be seated.

(In open court)

THE COURT: Ms. Rojas, would you please swear the marshal.

(Marshal sworn)

THE COURT: Ms. Rojas, would you please give Mr. Keith a copy of the special verdict form.

Mr. Keith, if you're selected as the foreperson of the jury, that is the form you must complete. If someone else is selected as the foreperson, would you please hand that form to them.

Thank you.

Ladies and gentlemen, lunch has been ordered for you. You may retire to the jury room to begin your deliberations. You may choose, when lunch arrives, to take a break and just eat and talk about other things with each other or you may continue your deliberations at that time, if you would prefer.

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1 But remember, you may not deliberate in this case unless all
2 eight of you are gathered together in the jury room, able to
3 listen to each other and talk with each other.

4 There were a few photographs or documents received
5 into evidence, and we will gather those together and send those
6 into the jury room to you now.

7 You may retire to begin your deliberations.

8 (At 12:18 p.m., the jury retired to deliberate)

9 THE COURT: The charge is marked as Court Exhibit 4.

10 So I believe there are a few documents that were
11 received in evidence, so let's gather those together now and
12 review those and then we'll give them to Ms. Rojas, who can
13 give them to the marshal to hand to the jury.

14 Can defense counsel help me there with respect to
15 gathering those documents.

16 MS. DEPOIAN: Yes, your Honor.

17 THE COURT: Okay. Can you announce on the record,
18 please, what documents you have gathered together to provide to
19 the jury.

20 MR. LICHTERMAN: Yes, your Honor. There's Defendant's
21 Exhibit A1, Defendant's Exhibit A4, Defendant's Exhibit A5,
22 Defendant's Exhibit A6, Defendant's Exhibit A7.

23 THE COURT: And those generally are what?

24 MR. LICHTERMAN: These are photographs of the
25 plaintiff.

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1 THE COURT: Thank you. And hand those, if you would,
2 to Ms. Rojas.

3 Mr. Munoz, I believe that you have some exhibits as
4 well. Ms. Rojas is just going to wait here. Do you want to
5 give Ms. Rojas plaintiff's exhibits that were received in
6 evidence.

7 And defense counsel, if you, again, would help me
8 here. But I think it is Plaintiff's Exhibits 1, 2, and 3.

9 Do you have those with you, Mr. Munoz?

10 MR. MUNOZ: I only have 2 and 3. I don't see 1.

11 THE COURT: 1 is the set of pictures. Or maybe it's
12 the Jacobi hospital record.

13 MR. LICHTERMAN: Your Honor, I believe the Jacobi
14 hospital records were a defendant's exhibit. We have them
15 marked as Defendant's Exhibit F.

16 THE COURT: Okay. Hand that to Ms. Rojas too, please.

17 Now do we have all the defendant's exhibits,
18 documentary exhibits that were received in evidence?

19 MR. LICHTERMAN: That's all the documentary exhibits.
20 We also had the gun, which was Defendant's Exhibit L.

21 THE COURT: We are not sending that into the jury
22 room, just the documentary exhibits.

23 Mr. Munoz, do you have Plaintiff's Exhibits 1, 2, and
24 3?

25 MR. MUNOZ: I see Mr. Lichterman has my picture over

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1 there. Do you want a copy of the picture that is of myself
2 that's -- that wasn't clear of me, and it's a couple more from
3 the ones in the hospital, the photocopies.

4 THE COURT: Mr. Lichterman, can you help the plaintiff
5 here get 1, 2, and 3 together.

6 MR. LICHTERMAN: Yes. We have the photos here.
7 They're not marked. So if we could just have a sticker and
8 we'll mark them, with a plaintiff's exhibit sticker.

9 THE COURT: It wasn't given an exhibit sticker at the
10 time?

11 MR. LICHTERMAN: This was a spare. This is our spare
12 copy.

13 THE COURT: Okay. So where is the original?
14 Mr. Munoz?

15 MR. MUNOZ: Those were taken from me yesterday, I
16 believe.

17 THE COURT: Okay. Mr. Lichterman, could you approach
18 Mr. Munoz and help him find 1, 2, and 3.

19 MR. LICHTERMAN: Yes, your Honor.

20 THE COURT: Mr. Munoz, can Mr. Lichterman help.

21 You know what, I'll have Ms. Rojas assist you.

22 Excuse me, Mr. Munoz. Ms. Rojas is going to approach
23 you and see if she can assist you in finding Plaintiff's
24 Exhibits 1, 2, and 3.

25 MR. MUNOZ: I have them right here.

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1 THE COURT: If you could just hand them to her.

2 Okay. I'd like to see them.

3 MR. MUNOZ: And your Honor?

4 THE COURT: Just hold on, Mr. Munoz. One step at a
5 time here.

6 Where are Exhibits 2 and 3?

7 MR. MUNOZ: Right here.

8 THE COURT: I'm going to staple the three documents
9 that constitute Plaintiff's Exhibit 1. We're going to staple
10 those together.

11 So I'm holding Plaintiff's Exhibits 1, 2, and 3.
12 Ms. Rojas?

13 I have A1, A4, A5, A6, A7, and F.

14 Now I'm going to ask Ms. Rojas to show these exhibits
15 to defense counsel and then to you, Mr. Munoz, to make sure
16 everyone is in agreement that these are the documentary
17 exhibits that were received in evidence and that may now be
18 sent back to the jury.

19 Ms. Rojas, if you could show those to defense counsel.

20 THE DEPUTY CLERK: Yes, your Honor.

21 MR. LICHTERMAN: Yes, they are, your Honor.

22 THE COURT: Ms. Rojas, could you show these to
23 Mr. Munoz, please.

24 MR. MUNOZ: Yes, your Honor.

25 THE COURT: Thank you. If you can hand them back to

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1 Ms. Rojas.

2 MR. MUNOZ: Thank you, Ms. Rojas.

3 THE COURT: Ms. Rojas, would you please provide those
4 exhibits to the marshal to be handed to the jury.

5 THE DEPUTY CLERK: Yes, your Honor.

6 THE COURT: So it's time for us to take a luncheon
7 recess. I don't know how long the jury will deliberate, so
8 we're going to take a 45-minute recess for lunch. So I'm going
9 to need one of the defense counsel back in the courtroom at
10 1:15. And the plaintiff will be given an opportunity now to
11 take a break and have lunch, and if we get a jury note, we will
12 call and have the plaintiff brought back to the courtroom
13 promptly. So everyone can enjoy their lunch break now, but
14 I'll need at least one of the defense lawyers back in the
15 courtroom by 1:15 to respond promptly to any jury note. Thank
16 you so much.

17 THE DEPUTY CLERK: All rise.

18 (Luncheon recess)

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AFTERNOON SESSION

1:33 p.m.

(In open court; jury not present)

THE COURT: Please be seated.

We've received two jury notes. Court Exhibit 5 reads, "The jury would like to know what Plaintiff's Exhibit 1 is a picture of." We received this after I excused everyone for lunch -- that's everyone in the courtroom -- and I excused you until 1:15.

In the meantime, we got another note from the jury, Court Exhibit 6, and it is a special verdict form. So we did not respond to Court Exhibit 5 before the verdict was returned. The jury got their lunch at about 1:10, so we got the verdict form after they had lunch for about 20 minutes. It's now 25 minutes after they got their lunch.

Bring in the jury.

(Jury present)

THE COURT: You may be seated.

Ladies and gentlemen, we received a note from you. We marked it as Court Exhibit 5. Let me read it to you.

"The jury would like to know what Plaintiff's Exhibit 1 is a picture of."

I had already excused the parties to have lunch, so we could not respond to that note because they were having lunch.

Then, as we were assembling, we got a special verdict

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1 form from you, and we've marked it as Court Exhibit 6. I'm now
2 going to read that court exhibit to you, your special verdict
3 form answers, and I'm going to ask each of you, after I read
4 it, whether this is your verdict. So please listen carefully.

5 "Issue I: Liability. Use of Excessive Force or
6 Failure to Intervene in Another's Use of Excessive Force.

7 "Did the plaintiff establish by a preponderance of the
8 evidence that his rights under Section 1983 were violated by:

9 "Defendant Reid? No.

10 "Defendant Jones? No.

11 "Defendant Flynn? No.

12 "Defendant Kelly? No."

13 Mr. Keith, is that your verdict?

14 JUROR: Yes.

15 THE COURT: Ms. Goldstein, is that your verdict?

16 JUROR: Yes.

17 THE COURT: Ms. Pantano, is that your verdict?

18 JUROR: Yes.

19 THE COURT: Ms. Puchalsky, is that your verdict?

20 JUROR: Yes.

21 THE COURT: Mr. Foote, is that your verdict?

22 JUROR: Yes, your Honor.

23 THE COURT: Ms. Graham, is that your verdict?

24 JUROR: Yes.

25 THE COURT: Ms. Diamond, is that your verdict?

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1 JUROR: Yes.

2 THE COURT: Mr. Tumminia, is that your verdict?

3 JUROR: Yes.

4 THE COURT: Is there any reason why I cannot now
5 dismiss this jury?

6 MR. LICHTERMAN: No, your Honor.

7 THE COURT: Mr. Munoz?

8 MR. MUNOZ: I guess not. I can't change their minds.

9 THE COURT: Thank you, Mr. Munoz. I appreciate that
10 response.

11 So ladies and gentlemen, you are now relieved of your
12 obligation not to discuss this case. You may choose to discuss
13 it with whomever you would like. I have one request for you in
14 that regard, though. If you choose to talk about the jury
15 deliberations, why don't you share your own views and thoughts
16 but keep confidential what others said during the deliberations
17 and let them make their own decision whether to share their
18 views and thoughts from the deliberations process.

19 You've made a decision about the facts of this case
20 and rendered your verdict, so I'm not going to comment on the
21 verdict in that way, but I do want to extend, on my own behalf,
22 on behalf of Mr. Munoz, on behalf of each of the defendants,
23 our gratitude to you for your willingness to serve as jurors.
24 You've seen how justice works in this country, how important
25 the jury system is, how everyone has access to our court

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1 system, everyone has a chance to bring a claim if they believe
2 they've been injured in some way, everyone has the chance to
3 hear that claim and the defenses offered in a courtroom and
4 have a determination made by their fellow citizens, according
5 to the instructions that I've given you as to the law, the
6 instructions that are written in our laws. And so we thank
7 you, deeply, for your commitment to our court system, to your
8 duties as citizens, to helping the parties in this case get
9 their day in court.

10 And now Ms. Rojas will give you some final
11 instructions. You may adjourn to the jury room. You are
12 dismissed.

13 (Jury discharged)

14 THE COURT: So Mr. Munoz, I wanted to thank you for
15 your cooperation with my staff and myself during this trial. I
16 know it was challenging to represent yourself, but you brought
17 this lawsuit, you were entitled to have the factual disputes
18 about your claim addressed by a jury. So you've had your day
19 in court, and I think the trial gave you an opportunity to
20 present your views and to do it under oath from the stand.

21 So is there anything else that we need to address at
22 this point?

23 MS. DEPOIAN: Nothing from the defendants, your Honor.

24 THE COURT: Anything from you, Mr. Munoz?

25 MR. MUNOZ: Yeah. I would like to know, am I going to

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1 get a surcharge for this?

2 THE COURT: I don't know what a surcharge is. I don't
3 know what you're referring to.

4 MR. MUNOZ: I'm referring to, do I have to pay
5 anything?

6 THE COURT: I have no idea. Not that I'm aware of.
7 As a plaintiff, you brought a lawsuit. The jury has not ruled
8 in your favor, but there's been no verdict of damages issued
9 against you.

10 Now the filing of a lawsuit in federal court brings
11 its own complications with respect to a law called the PSLRA,
12 and it permits plaintiffs -- I prefer to really read from the
13 statute or the case law, but giving you my recollection, if
14 there are a certain number of cases that are filed by a
15 prisoner that are found not to be meritorious, at some point
16 you lose your right to bring federal claims or claims in court
17 without paying certain fees, but I know of no fee that you must
18 pay now because you lost this lawsuit. Obviously if someone
19 has assessed a fee against you at some point, you'll have a
20 right to inquire as to why that fee is being assessed and they
21 will have to point you to the right regulation or explanation
22 under the law in order to answer your question.

23 MR. MUNOZ: So you're telling me that I don't have
24 to -- as per your knowledge, I don't have to pay no fee?

25 THE COURT: There is no damage award that this jury

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1 has entered against you.

2 MR. MUNOZ: Okay.

3 THE COURT: You asked for damages to be awarded by the
4 jury in your favor against the defendants. The defendants did
5 not ask the jury to find, nor could they have in this case, for
6 damages to be issued against you. But there is a federal
7 statute that says if people file frivolous lawsuits in federal
8 court, at some point they cannot proceed with an additional
9 lawsuit without a charge.

10 Give me one second.

11 We've checked the docket sheet. You did not proceed
12 in this lawsuit -- there's a term of art, *in forma pauperis*,
13 that is, without a filing fee. Indeed, you filed this lawsuit
14 by paying a filing fee. So that fee has already been paid. So
15 the consequences of your loss today in court will only
16 potentially affect you should you file another lawsuit or
17 claim, okay?

18 MR. MUNOZ: Can I get a copy of that, of what you just
19 said, or would it be in my transcript?

20 THE COURT: Well, actually, I am not ruling in any way
21 on any future fee that anyone may come to collect from you.

22 MR. MUNOZ: All right. Okay. Got it.

23 THE COURT: If there is a future fee that someone
24 comes to collect from you, they're going to have to explain
25 why.

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1 MR. MUNOZ: Okay, ma'am.

2 THE COURT: But everything I've said, of course, is
3 taken down by the court reporter and there is a transcript.
4 But I doubt that anything I have to say now is going to have
5 much effect if there is a future fee charged against you for
6 some other complaint you file in some other case.

7 MR. MUNOZ: So if there's, like, an appeal, if I was
8 to appeal, something like that?

9 THE COURT: Oh, well, that is a separate issue.

10 MR. MUNOZ: But I don't know yet. I don't think so.

11 THE COURT: Okay. You don't think you're going to
12 appeal?

13 MR. MUNOZ: No. I just want to make sure I'm all
14 right. I mean, I tried my best, and to be honest, I'm not
15 really -- I get family support and support from my fiancée.
16 But what I was explained was, by the lawyer that helped me over
17 there, in state prison, that if I was to lose, I was gonna get
18 a surcharge fee of maybe \$400, so that's why the question came
19 up.

20 THE COURT: Okay. I don't know anything about that
21 \$400. I'm not aware of any fee that would be imposed. So if
22 someone tries to impose a fee on you, ask them to explain to
23 you what the basis of that is. They should do that in writing
24 so you can have it checked out.

25 MR. MUNOZ: Okay, ma'am.

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1 THE COURT: Good. Good. Thank you, all.

2 THE DEPUTY CLERK: All rise.

3 MR. MUNOZ: Thank you, your Honor.

4 MS. DEPOIAN: Thank you, your Honor.

5 MR. LICHTERMAN: Thank you, your Honor.

6 THE COURT: You're welcome, Mr. Munoz. You're
7 welcome, everyone.

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